DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-98
Title: John D. Ashcroft, Petitioner
v.
Abdullah al-Kidd
Docketed: July 19, 2010
Linked with 09A1186
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-36059)
Decision Date: September 4, 2009
Rehearing Denied: March 18, 2010
Questions Presented

Date	Proceedings and Orders
Jun 4 2010	Application (09A1186) to extend the time to file a petition for a writ of certiorari from June 16, 2010 to July 16, 2010, submitted to Justice Kennedy
Jun 7 2010	Application (09A1186) granted by Justice Kennedy extending the time to file until July 16, 2010
Jul 16 2010	Petition for a writ of certiorari filed. (Response due August 18, 2010)
Jul 23 2010	Brief amicus curiae of Wesley MacNeil Oliver filed
Jul 28 2010	Order extending time to file response to petition to and including September 17, 2010
Aug 18 2010	Brief amici curiae of William P. Barr, et al. filed
Sep 17 2010	Brief of respondent Abdullah al-Kidd in opposition filed
Sep 29 2010	DISTRIBUTED for Conference of October 15, 2010
Sep 29 2010	Reply of petitioner John D. Ashcroft filed. (Distributed)
Oct 18 2010	Petition GRANTED limited to Questions 1 and 2 presented by the petition. Justice Kagan took no part in the consideration or decision of this petition.
Nov 3 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 13, 2010.
Nov 3 2010	The time to file respondent's brief on the merits is extended to and including January 21, 2011.
Dec 13 2010	Joint appendix filed. (Statement of costs filed.)
Dec 13 2010	Brief of petitioner John D. Ashcroft filed.
Dec 13 2010	Brief amicus curiae of Wesley MacNeil Oliver filed.
Dec 20 2010	Brief amicus curiae of William P. Barr, et al. filed.
Dec 23 2010	SET FOR ARGUMENT ON Wednesday, March 2, 2011.
Jan 3 2011	CIRCULATED.
Jan 21 2011	Brief of respondent Abdullah al-Kidd filed. Reprinted. (Distributed)
Jan 24 2011	Record received from U.S. Court of Appeals for Ninth Circuit. (1 envelope)
Jan 24 2011	Record from U.S.D.C. for the District of Idaho is electronic.
Jan 28 2011	Brief amicus curiae of The Constitution Project filed. (Distributed)
Jan 28 2011	Brief amici curiae of Legal History and Criminal Procedure Law Professors filed. (Distributed)
Jan 28 2011	Brief amici curiae of Legal Scholars filed. (Distributed)
Jan 28 2011	Brief amicus curiae of Center for Justice and Accountability filed. (Distributed)
Jan 28 2011	Brief amicus curiae of Former Federal Prosecutors filed. (Distributed)
Jan 28 2011	Brief amici curiae of Human Rights Watch, and National Association of Criminal Defense Lawyers filed. (Distributed)
Feb 22 2011	Reply of petitioner John D. Ashcroft filed. (Distributed)
Mar 2 2011	Argued. For petitioner: Neal Kumar Katyal, Acting Solicitor General.

Department of Justice, Washington, D. C. For respondent: Lee Gelernt, New York, N. Y.

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent was arrested on a material witness warrant issued by a federal magistrate judge under 18 U.S.C. 3144 in connection with a pending prosecution. He later filed a *Bivens* action against petitioner, the former Attorney General of the United States, seeking damages for his arrest. Respondent alleged that his arrest resulted from a policy implemented by the former Attorney General of using the material witness statute as a "pretext" to investigate and preventively detain terrorism suspects. In addition, respondent alleged that the affidavit submitted in support of the warrant for his arrest contained false statements. The questions presented are:

1. Whether the court of appeals erred in denying petitioner absolute immunity from the pretext claim.

2.. Whether the court of appeals erred in denying petitioner qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of respondent's arrest.

3. Whether the former Attorney General may be held liable for the alleged false statements in the affidavit supporting the material witness warrant, even though the complaint does not allege that he either participated in the preparation of the affidavit or implemented any policy encouraging such alleged misconduct.

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In the Supreme Court of the United States

No.

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of former Attorney General John Ashcroft, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-105a) is reported at 580 F.3d 949. The opinions concurring in and dissenting from the denial of rehearing en banc (App., *infra*, 106a-132a) are reported at 598 F.3d 1129. The unpublished opinion of the district court is available at 2006 WL 5429570.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2009. A petition for rehearing was denied

on March 18, 2010. (App., *infra*, 106a). On June 7, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The material witness statute, 18 U.S.C. 3144, provides in relevant part:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. a. In the months after the terrorist attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) conducted an anti-terrorism investigation in Idaho. As a result of that investigation, on February 13, 2003, a grand jury sitting in the District of Idaho returned an indictment charging an individual named Sami

Omar Al-Hussayen with multiple false-statements and visa-fraud offenses.[1] The charges against Al-Hussayen centered on allegations that he had falsely stated in his applications for a student visa in 2000 and 2002 that he was entering the United States solely for the purpose of pursuing a course of academic study, when in fact he was spending much of his time providing technical support to the Islamic Assembly of North America (IANA), an organization that disseminated radical Islamic ideology and sought to recruit others to engage in acts of violence and terrorism. Indictment ¶¶ 15-17, 3:03-cr-00048-EJL Docket Entry No. 1 (D. Idaho Feb. 13, 2003). The indictment also alleged that Al-Hussayen moved significant sums through his bank account—approximately $300,000 in excess of his student fees—that were used "to pay operating expenses of the IANA, including salaries of IANA employees." *Id.* at ¶¶ 23-24.

As part of the same investigation, the FBI conducted surveillance of respondent and learned that he had a number of ties to Al-Hussayen. One month after Al-Hussayen was indicted, the FBI also learned that respondent had booked an airplane ticket to Saudi Arabia. At that point, on March 14, 2003, the United States Attorney's Office for the District of Idaho, which was prosecuting Al-Hussayen, applied to the magistrate judge for a warrant for respondent's arrest under the material witness statute, 18 U.S.C. 3144. App., *infra*, 3a-4a, 66a. In the warrant application, prosecutors asserted that respondent's testimony was "material to both the prosecution and the defendant" in the Al-Hussayen case and that there was a risk that respondent would be un-

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[1] Superseding indictments later added three counts of conspiracy to provide material support to terrorist organizations.

available "unless the Court detains or imposes restrictions on the travel of said material witness." Application for Arrest Warrant of Material Witness at 2, 3:03-cr-00048-EJL Docket entry No. 34 (D. Idaho Mar. 17, 2003).

The application was supported by a sworn affidavit of FBI Special Agent Scott Mace. Aff. of Scott Mace in Supp. of Warrant Application, 3:03-cr-00048-EJL Docket entry No. 34 (D. Idaho Mar. 17, 2003). In the affidavit, Mace stated that respondent had been involved with Al-Hussayen in several respects: he had received "payments from [Al-Hussayen] and his associates in excess of $20,000.00" and had met with Al-Hussayen's associates and IANA officials shortly after returning from a trip to Yemen. *Id.* at ¶ 6. Based on that information, Mace stated that respondent "is believed to be in possession of information germane to this matter which will be crucial to the prosecution." *Id.* at ¶ 8. Mace further stated that respondent "is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST." *Id.* at ¶ 7. The affidavit concluded by stating that "if [respondent] travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." *Id.* at ¶ 8.

The magistrate judge granted the government's application, issued an arrest warrant, and ordered that respondent be brought before the court "for the purpose of setting the methods and conditions of release." Order, 3:03-cr-00048-EJL Docket entry No. 35 (D. Idaho March 17, 2003). Two days later, on March 16, 2003, FBI agents arrested respondent at Dulles International Airport as he prepared to board his scheduled flight to Saudi Arabia. First Amended Compl. ¶¶ 47, 65, 1:05-cv-

00093-EJL Docket Entry No. 40 (D. Idaho Nov. 18, 2005) (Compl.). Respondent was detained briefly at the Alexandria Detention Center in Virginia before he was sent to the Ada County Jail in Boise, Idaho, via a federal transfer facility in Oklahoma. *Id.* at ¶ 70.

b. On March 25, 2003, respondent appeared with counsel before the Idaho magistrate judge who had issued the arrest warrant. At a second hearing on March 31, 2003, the government proposed that respondent be released from custody subject to certain conditions. Compl. ¶¶ 9, 102, 103. The court agreed, releasing respondent that day to the custody of his wife in Nevada on condition that he continue to reside with her, surrender his passport, and agree to limit his travel to Nevada and three neighboring states. *Ibid.* In total, respondent spent 15 in detention. *Id.* at ¶ 6.

Al-Hussayen's trial ended on June 10, 2004 when the jury acquitted him on some charges and failed to reach a verdict on others. Respondent was not called to testify. Compl. ¶ 10. After the trial concluded, the district court granted respondent's motion to terminate the conditions of his release. *Id.* at ¶ 107.

2. In March 2005, respondent sued the United States and a number of government officials, including petitioner, seeking damages for alleged violations of, *inter alia*, the material witness statute and the Fourth Amendment. Compl., 1:05-cv-00093-EJL Docket entry No. 1 (D. Idaho Mar. 15, 2005).

Respondent's complaint rested on two factual assertions. First, respondent claimed that, in response to the September 11, 2001, terrorist attacks, petitioner implemented a policy of using the material witness statute as a pretextual tool to investigate and detain terrorism suspects whom the government lacked probable cause to

charge criminally. Respondent alleged that he was arrested as a result of this alleged policy, which he contended violated the Fourth Amendment. Compl. ¶ 108-141. Second, respondent alleged that the Mace affidavit submitted in support of the material witness warrant contained deliberately false statements. In particular, respondent averred that, contrary to the Mace affidavit, his airplane ticket to Saudi Arabia was not a one-way first-class ticket costing $5000, but instead a round-trip coach ticket costing $1700. *Id.* at ¶ 53. Respondent also alleged that the affidavit omitted material information, including that he was a United States citizen and that he had previously cooperated with the FBI investigation. *Id.* at ¶ 54.[2]

Petitioner and the other individual defendants moved to dismiss on grounds of personal jurisdiction, official immunity, and inadequate pleading. Mot. to Dismiss, 1:05-cv-00093-EJL Docket entry No. 47 (D. Idaho Jan. 23, 2006). The district court denied the motions, and petitioner filed an interlocutory appeal.

3. A divided panel of the court of appeals affirmed in relevant part. App., *infra*, 1a-64a.

a. The court first held that petitioner was not entitled to absolute immunity on respondent's claims that petitioner implemented a policy of using the material witness statute as a pretext to detain terrorism suspects for investigative or preventive purposes. The panel acknowledged that "absolute immunity ordinarily attaches to the decision to seek a material witness warrant," App., *infra*, 19a, but it reasoned that whether such im-

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[2] The complaint also sought damages based on the alleged conditions of respondent's confinement during the 15 days he was in custody. See Compl. ¶¶ 154, 157, 160. The court of appeals ordered that claim dismissed, App., *infra*, 59a, and it is not at issue here.

munity attaches in any particular case depends on "the prosecutor's *mission* and *purpose*" in obtaining such a warrant. *Id.* at 23a; see *id.* at 20a (concluding that, under a "functional approach" to absolute immunity, the court was required to "take into account the goal of performing an action to determine function").

Based on that reasoning, the court concluded that the act of seeking a material witness warrant is not protected by absolute immunity if the prosecutor's "immediate purpose" is investigation or preventive detention. App., *infra*, 20a. Concluding that respondent had alleged sufficient facts "to render plausible the allegation of an investigatory function," the court held that absolute immunity did not apply. *Id.* at 26a.

b. The court next rejected petitioner's qualified immunity defense. The court reasoned that, even if all the requirements of the material witness statute are satisfied and a judge issues a valid arrest warrant, the Fourth Amendment prohibits a seizure based on that warrant when the prosecutor's true motivation is to conduct further investigation or preventively detain a suspect. See App., *infra*, 30a-40a. The court rejected petitioner's contention that *Whren* v. *United States*, 517 U.S. 806, 813 (1996), forecloses inquiry into subjective purpose or "pretext" in determining the validity of an arrest. In the court's view, "*Whren* rejected only the proposition that 'ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to *believe that a violation of law has occurred.*'" App., *infra*, 32a (quoting *Whren*, 517 U.S. at 811). Because material witness arrests are not based on suspected wrongdoing, the court reasoned, the relevant precedent was instead *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), in which this Court held that the Fourth

Amendment prohibits motor vehicle checkpoints designed to interdict drugs. App., *infra*, 36a-38a. The panel concluded that *Edmond* permits inquiry into "programmatic purpose" to assess "the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Id.* at 36a (quoting *Edmond*, 531 U.S. at 45-46). The court therefore held that respondent had stated a valid Fourth Amendment claim in alleging that his arrest resulted from petitioner's policy of using the material witness pretextually.

The court also concluded that the illegality of that policy was clearly established at the time of respondent's arrest. App., *infra*, 46a. The majority acknowledged that "[i]n March 2003, no case had squarely confronted the question of whether misuse of the material witness statute to investigate suspects violates the Constitution." *Id.* at 41a. Nevertheless, the majority reasoned that *Edmond* and *Illinois* v. *Lidster*, 540 U.S. 419, 422 (2004) (upholding police checkpoints designed to obtain more information about a particular accident from the motoring public), "put [petitioner] on notice that the material witness detentions—involving a far more severe seizure than a mere traffic stop—would be similarly subject to an inquiry into programmatic purpose." App., *infra*, 43a. The majority also concluded that the impermissibility of the alleged "pretext" policy was further established by "the history and purposes of the Fourth Amendment," *ibid.*, "the definition of probable cause," *id.* at 42a, and "dicta in a footnote of a district court opinion" from a different circuit. *Id.* at 46a (citing *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002), rev'd on other grounds, 349

F.3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005)).

c. Finally, the court held that respondent had adequately alleged petitioner's responsibility for the false statements in the affidavit supporting the material witness warrant application. App., *infra*, 47a-56a. Rejecting petitioner's contention that this aspect of the complaint failed the pleading standards set forth in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), the court concluded that petitioner could be held liable for "setting in motion a series of acts by others * * * which [he] knew or reasonably should have known would cause others to inflict constitutional injury" and for "acquiescence in the constitutional deprivation by subordinates." App., *infra*, 30a. Respondent's allegations, the court reasoned, supported liability "on the basis of [petitioner's] *knowing failure* to act in the light of even unauthorized abuses," *id.* at 52a, and "plausibly suggest that [petitioner] purposely instructed his subordinates to bypass the plain reading of the statute." *Id.* at 53a.

4. Judge Bea dissented in relevant part. App., *infra*, 64a-105a. He disagreed with the majority's conclusion that an arrest based on a valid material witness warrant violates the Fourth Amendment if the prosecutor's subjective intent is to conduct further investigation. *Id.* at 68a. Judge Bea noted that this Court and the Ninth Circuit had "repeatedly stated that under the Fourth Amendment, an officer's subjective intentions are irrelevant so long as the officer's conduct is objectively justified." *Id.* at 70a-71a. He noted the many "good reason[s] to eschew inquiry into the subjective motivations of individual officers," including that such an inquiry is "impossibly difficult" and would undermine the purposes of the qualified immunity defense. *Id.* at

73a-74a. In his view, the majority erred by "import[ing] the 'programmatic purpose' test" from cases testing "the constitutional validity of *warrantless* searches and seizures." *Id.* at 74a-75a. Judge Bea regarded those cases as having "no bearing * * * for the simple reason" that respondent "was arrested pursuant to a warrant issued by a neutral magistrate." *Id.* at 75a. Judge Bea also concluded that, even if the majority were correct in its Fourth Amendment analysis, it erred in concluding that such rights were clearly established. *Id.* at 84a-86a.

On the claims alleging false statements in the Mace affidavit, Judge Bea concluded that the "complaint simply does not state facts that plausibly establish that [petitioner] through [his] own actions, violated [respondent's] rights." App., *infra*, 87a (citation omitted). In particular, Judge Bea found nothing in respondent's allegations plausibly establishing that petitioner "knew of or encouraged his subordinates recklessly to disregard the truth in the preparation of supporting affidavits." *Id.* at 88a. At most, Judge Bea reasoned, respondent's allegations established that petitioner "encouraged prosecutors to use material witness warrants as a means to accomplish other law enforcement objectives," but that conclusion would support only respondent's claim that petitioner implemented a policy of using material witness warrants pretextually, not the distinct claim that petitioner bore responsibility for obtaining such warrants through false statements. *Id.* at 90a.

Finally, although Judge Bea deemed it unnecessary to reach the issue, he concluded that petitioner was entitled to absolute immunity from the pretext claim insofar as it was based on petitioner's supervision of the prosecutors who sought the material witness warrant. App., *infra*, 92a-104a. Judge Bea reasoned that the majority's

inquiry into the prosecutor's "immediate purpose" conflicted with Supreme Court and circuit precedent, lacked coherence as a doctrinal principle, and created perverse incentives for prosecutors to alter their decisions about trial strategy in order to avoid personal liability. See *id.* at 98a-104a.

5. The full court of appeals denied petitioner's request for rehearing en banc over the dissent of eight judges. Joined by seven other judges, Judge O'Scannlain wrote a lengthy dissent focusing on "two distinct but equally troubling legal errors" in the panel decision that together produced the "startling conclusion" that "a former Attorney General of the United States may be *personally liable* for promulgating a policy under which his subordinates took actions expressly authorized by law." App., *infra*, 122a, 125a.

First, Judge O'Scannlain concluded that, in denying petitioner qualified immunity on the pretext claim, the court had "distort[ed] the bedrock Fourth Amendment principle that an official's subjective reasons for making an arrest are constitutionally irrelevant." App., *infra*, 126a. He reasoned that *Edmond*'s "programmatic purpose" inquiry applies only in evaluating warrantless seizures and therefore is "totally inapplicable here." *Id.* at 127a. Judge O'Scannlain also observed that by holding that the Fourth Amendment prohibits an arrest that the material witness statute permits, the court had "effectively declar[ed] the material witness unconstitutional, at least as applied to [respondent]." *Id.* at 125a. In addition, Judge O'Scannlain argued that the court had "compound[ed] its error by holding that the right to be free from a detention under a pretextual material witness warrant was clearly established at the time of [respondent's] arrest." *Id.* at 128a. In Judge O'Scannlain's

view, "[t]he majority's assertion that three sentences of dicta in a footnote to a subsequently reversed district court opinion clearly establish a right that the majority expended nearly three-thousand words describing is truly astonishing." *Id.* at 129a.

Second, Judge O'Scannlain concluded that the court erred in holding "that [petitioner] may be held personally liable to [respondent] if his *subordinates* provided false testimony in support of their application for a material witness warrant." App., *infra*, 130a. He noted that there was no allegation that petitioner himself approved of such false testimony and that, by permitting a claim on the basis of the alleged misconduct of those whom petitioner supervised, the court reached "a result indisputably at odds with *Iqbal*." *Ibid.*

The court's errors, Judge O'Scannlain reasoned, will inflict "gratuitous damage * * * upon orderly federal law enforcement," App., *infra*, 123a, and "have far-reaching implications for how government officials perform their duties." *Id.* at 125a.

REASONS FOR GRANTING THE PETITION

The court of appeals committed a series of fundamental errors, the immediate effect of which is to expose the former Attorney General to burdensome litigation and potential damages for the conduct of his subordinates. Those substantial harms are compounded by the decision's long-term consequences, which will be to threaten the ability of prosecutors to discharge their duties without fear of personal liability, severely limit the usefulness of the material witness statute, and substantially chill officers in the exercise of important governmental functions. The court permitted the suit against petitioner to proceed even though the only activ-

ity in which he is alleged to have participated was authorized by an Act of Congress and approved by a federal magistrate judge. The Ninth Circuit's decision conflicts with decisions of this Court and, if permitted to stand, would severely damage law enforcement and proper governmental functioning. Accordingly, this Court's review is warranted on three discrete issues.

First, the court denied petitioner absolute immunity from claims that he instructed his subordinates to seek a material witness warrant —ordinarily deemed an integral part of a prosecutor's advocacy function—because respondent alleged that the "immediate purpose" of the warrant was "investigative." The Ninth Circuit's newly minted "immediate purpose" test conflicts with the longstanding principle that absolute immunity applies regardless of a prosecutor's intent. It would also undermine the policy objectives of the absolute immunity doctrine and expose prosecutors to suit when they exercise other core advocacy functions.

Second, the court of appeals held that the Fourth Amendment prohibits the use of valid material witness warrants as a "pretext" for further investigation of a suspect. That holding is inconsistent with this Court's precedent recognizing that an officer's subjective intent does not render an arrest invalid under the Fourth Amendment. See *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004); *Whren* v. *United States*, 517 U.S. 806, 808-810 (1996). The court compounded that error by holding that its unprecedented decision (supported primarily by dicta in a footnote of a subsequently reversed district court decision from different circuit) was sufficiently "clearly established" to impose personal liability upon the former Attorney General. Together, these holdings would severely limit prosecutors' ability and willingness

to use the material witness statute in commonly arising circumstances.

Third, the court of appeals ruled that the former Attorney General may be held responsible for alleged misstatements or omissions in the affidavit of an FBI agent filed in support of the warrant for respondent's arrest as a material witness. In reaching that conclusion, the Ninth Circuit adopted a theory of supervisory liability that is directly contrary to this Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009).

A. The Ninth Circuit's Denial Of Absolute Immunity Conflicts With Decisions Of This Court And Undermines The Purposes For Which Such Immunity Exists

The court of appeals held that petitioner was not entitled to dismissal of the pretext claim on absolute immunity grounds because, according to the complaint, respondent's arrest was motivated by the "immediate purpose" of conducting further investigation. That analysis conflicts with decisions of this Court and other courts of appeals. If permitted to stand, it would frustrate the purposes of prosecutorial immunity and chill the exercise of important government functions. This Court's review is warranted.

1. a. The court of appeals erred in denying petitioner absolute immunity on the claim that he implemented a policy of using the material witness statute to investigate or preventively detain terrorism suspects. Absolute immunity protects prosecutors from suit for acts that constitute "the traditional functions of an advocate," *Kalina* v. *Fletcher*, 522 U.S. 118, 131 (1997), and that are "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). As a number of courts have concluded, seek-

ing a material witness warrant in a pending prosecution is part of an advocate's traditional function. See *id.* at 431 n.33 (stating that the prosecutor's role as advocate includes "which witnesses to call"); *Daniels* v. *Kieser*, 586 F.2d 64, 68-69 (7th Cir. 1978) (decision to seek a material witness warrant to secure the presence of a witness at trial is subject to absolute immunity), cert. denied, 441 U.S. 931 (1979); *Betts* v. *Richard*, 726 F.2d 79, 81 (2d Cir. 1984) (state prosecutor's action in obtaining a *capias* to secure the presence of a witness at trial subject to absolute immunity); *Walden* v. *Wishengrad*, 745 F.2d 149, 151-153 (2d Cir. 1984) (attorney representing state Department of Social Services in parental termination proceedings has absolute immunity for seeking arrest warrant to compel witness to appear).

Thus, even assuming the truth of respondent's allegations, petitioner's act of instructing prosecutors under his supervision to obtain material witness warrants in certain circumstances is conduct protected by absolute immunity. See *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 861-862 (2009) (holding that supervisors are entitled to absolute immunity for training, instructing, and supervising line prosecutors on matters that are intimately associated with the judicial phase of the criminal process).

b. The court acknowledged that absolute immunity generally applies to the decision to seek a material witness warrant, but it held that such immunity is unavailable when the prosecutor's "immediate purpose" is "to investigate or preemptively detain a suspect." App., *infra*, 25a. That conclusion conflicts with the principle, well established in this Court's decisions, that the applicability of official immunity does not turn on motive or intent. See, *e.g.*, *Cleavinger* v. *Saxner*, 474 U.S. 193,

199-200 (1985) (judicial immunity cannot "be affected by the motives with which their judicial acts are performed" (quoting *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872)); *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973) ("Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith.").

Consistent with that principle, no court of appeals has adopted the Ninth Circuit's "immediate purpose" approach, and several courts of appeals have rejected the notion that the prosecutor's intent informs the absolute immunity analysis. See, *e.g.*, *Bernard* v. *County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) (the "fact that improper motives may influence" a prosecutor's exercise of discretion "cannot deprive him of absolute immunity"); *Austin Mun. Sec., Inc.* v. *National Ass'n of Sec. Dealers*, 757 F.2d 676, 685 (5th Cir. 1985) ("[T]he intent with which * * * defendants operate is irrelevant to the absolute immunity issue."); *Ashelman* v. *Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc) ("Intent should play no role in the immunity analysis.").

The court of appeals' reasons for ignoring this body of contrary precedent do not withstand scrutiny. The court premised its "immediate purpose" test on language in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), but read in context, that language provides no support for the Ninth Circuit's approach. *Fitzsimmons* explained that the determination of the nature of the acts at issue turned on "[a] careful examination of the allegations concerning the conduct of the prosecutors," based on objective factors such as whether the prosecutors had probable cause to arrest and whether judicial proceedings were pending at the time. *Id.* at 274. In the course of that discussion, the Court noted that the "immediate

purpose" of the special grand jury in which prosecutors were alleged to have submitted fabricated evidence was "to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." *Id.* at 275. That discussion is entirely consistent with a focus on the objective circumstances surrounding a prosecutor's conduct to determine the applicability of absolute immunity. Contrary to the Ninth Circuit's conclusion, it does not amount to "an invitation to probe the minds of individual" prosecutors to discern whether, although they engaged in conduct that is a core part of the advocacy function, their true intent in doing so was "investigative." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 48 (2000).

The court also reasoned that cases eschewing inquiry into a prosecutor's intent "universally involve allegations that the otherwise prosecutorial action was secretly motivated by malice, spite, bad faith, or self-interest," whereas this case involved an attempt to discern whether a prosecutor is exercising "investigative or national security functions." App., *infra*, 19a. But there is no support for the court of appeals' view that inquiry into the motives of the prosecutor is permissible for some purposes but not for others. The court of appeals' decision would yield different immunity rulings for the same acts in the same circumstances depending upon the alleged motive of the prosecutor. Thus, under the decision below, a prosecutor who seeks a material witness warrant for retaliatory reasons, or simply out of racial animus, would receive absolute immunity because his conduct is not "investigative." But a prosecutor who performs exactly the same function, in precisely the same circumstances, and at the same stage of the pro-

ceedings, would receive no such protection if he acted with the intent to further an ongoing criminal investigation. That anomalous result finds no support in law or logic.

2. The Ninth Circuit's "immediate purpose" analysis not only conflicts with bedrock immunity principles but will also frustrate the purposes of absolute immunity and expose prosecutors to suit for decisions about trial strategy.

a. Absolute prosecutorial immunity rests on bedrock public-policy considerations, see *Imbler*, 424 U.S. at 422-423, including the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. Thus, "qualifying a prosecutor's immunity would disserve the broader public interest" because it "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-428.

To achieve its purposes, absolute immunity protects prosecutors not just from liability but also from the burdens of defending a lawsuit. As the dissent recognized, however, the court's holding that the availability of immunity turns on the prosecutor's intent would require "precisely the kind of expensive discovery and litigation [that] immunity was designed to avoid." App., *infra*, 103a. Allegations of improper purpose are "easy to allege and hard to disprove." *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (internal quotation marks omitted). The risks posed by such allegations are particularly acute in litigation against government officials. In the qualified

immunity context, this Court has explained that "'subjective' inquiries of th[e] kind" required by the decision below incur not only "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," but also "special costs" involved in investigating subjective motivation that are "peculiarly disruptive of effective government." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816-817 (1982). These observations apply with equal if not greater force to absolute immunity.

Thus, by holding that allegations of an "investigative" purpose suffice to defeat a motion to dismiss based on absolute immunity, the decision below seriously undermines the purposes for which such immunity exists. Cf. *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54-55 (1998) ("The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'") (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951)).

b. The rationale of the decision below, by stripping prosecutors of absolute immunity, would expose them to suit for other core advocacy functions.

It is settled, for example, that decisions about whether and what charges to bring against a defendant are among the most basic functions of an advocate. But prosecutors routinely bring charges against lower-level offenders in circumstances where defendants could allege that their "immediate purpose" is both obtaining critical information about more valuable suspects and actively enlisting the defendant in investigative efforts,

not to proceed with a prosecution. Under the decision below, such motives would presumably expose the prosecutor to suit and entitle a defendant to discovery on claims seeking damages for vindictive or retaliatory prosecution.

The court of appeals acknowledged that defendants would likely invoke the "immediate purpose" exception to sue prosecutors for bringing criminal charges on the notion that the "real" purpose of charges was to pressure the defendant to cooperate in an ongoing investigation. The court simply declared, however, that a "prosecutor who files charges may hope, eventually, that the petty crook will implicate his boss," but "the *immediate* purpose of filing charges is to *begin a prosecution*—the better to pressure the defendant into providing information." App., *infra*, 25a. But that reasoning has no principle behind it, as the dissent recognized. *Id.* at 103a ("[W]hy isn't the prosecutor's 'immediate purpose' in this case to secure a witness's appearance at trial rather than to obtain evidence against [respondent]?"). The potential implications of the decision below for the scope of absolute immunity in a range of contexts thus warrants review by this Court.

B. The Qualified Immunity Analysis In The Decision Below Warrants This Court's Review

The court of appeals further held that petitioner is not entitled even to qualified immunity from suit on respondent's pretext claims. That decision was incorrect on multiple levels. The Ninth Circuit's conclusion that the Fourth Amendment prohibits a "pretextual" arrest on a valid material witness warrant not only conflicts with fundamental tenets of this Court's precedents but also effectively invalidates the material witness statute

as unconstitutional in the circumstances of this case. The court's conclusion that such a Fourth Amendment rule was clearly established, moreover, represents a serious misapplication of qualified immunity doctrine. The Ninth Circuit's rulings impinge on the exercise of important government functions and merit this Court's review.

1. The Ninth Circuit's Fourth Amendment ruling conflicts with decisions of this Court and invalidates an Act Of Congress

a. Contrary to the court of appeals' holding, an arrest based on a material witness warrant validly issued by a magistrate judge does not violate the Fourth Amendment because prosecutors were motivated to seek it for "investigative" purposes. A long line of this Court's cases holds that an officer's motives are irrelevant to the lawfulness of his or her conduct under the Fourth Amendment. In *Whren* v. *United States*, 517 U.S. 806, 813 (1996), this Court expressly rejected the contention that the Constitution prohibits the use of traffic offenses "as pretexts for pursuing other investigatory agendas," *id.* at 811, and held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. The Court reemphasized that conclusion in *Devenpeck* v. *Alford*, 543 U.S. 146 (2004), holding that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Id.* at 153. Those decisions foreclose the court of appeals' holding that the subjective intent of the prosecutor renders unconstitutional an arrest based on a valid material witness warrant.

The court reasoned that the principle of *Whren* and *Devenpeck* does not apply here because those cases involved arrests based on "probable cause to *believe that a violation of law has occurred*." App., *infra*, 32a (quoting *Whren*, 517 U.S. at 811) (emphasis by the court). The court noted that, in contrast, "[a]n arrest of a material witness is not justified by probable cause because the two requirements of Section 3144 (materiality and impracticability) do not constitute the elements of a crime." *Id.* at 34a. The court thus concluded that because a material witness arrest is not supported by "probable cause to arrest," the applicable standard was supplied by cases involving warrantless searches at motor vehicle checkpoints, as to which "an inquiry into purpose at the programmatic level" is appropriate under *Edmond*, 531 U.S. at 46.

That conclusion is fundamentally flawed for two principal reasons. First, the "programmatic purpose" standard of *Edmond*, which was derived from generalized and warrantless searches of vehicles, does not apply in this context because a material witness arrest is conducted pursuant to a warrant issued by a neutral magistrate. As the dissent explained, "[t]he 'programmatic purpose' inquiry is necessary to test the validity of a special needs search precisely because such searches occur without the procedural protections of the warrant requirement and the magisterial supervision it entails." App., *infra*, 75a-76a. Second, the *Edmond* framework applies only to seizures that lack any individualized basis and may be justified, if at all, by the generalized interest that motivates the program pursuant to which they are conducted. Arrests based on a material witness warrant are objectively justified by the individualized probable-cause determination that the subject possesses

information important to an ongoing criminal proceeding. The court of appeals concluded that the concept of "probable cause" inherently relates only to suspected criminal wrongdoing, but for the reasons persuasively explained by the dissent, that conclusion "reflects a fundamental misunderstanding of the Fourth Amendment." *Id.* at 76a; see *id.* at 76a-82a.

Not only was the court's invocation of *Edmond* wrong, its application of the *Edmond* approach was wrong, too. The "program" at issue in *Edmond* was a police department practice of erecting random roadblocks intended to catch drug offenders. While this Court evaluated the purpose of that policy, it specifically "caution[ed] that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." 531 U.S. at 48. In other words, the Court approved of asking why the City had chosen to institute the program, but disapproved of asking why a particular officer on the scene conducted a seizure pursuant to it.

Here, the "program" at issue is the material witness statute, which Congress enacted to provide prosecutors with a means of ensuring that key witnesses would appear at trial. That "programmatic" purpose—Congress's purpose—is consistent with the Fourth Amendment, and neither the court of appeals nor respondent has argued otherwise. The court of appeals, however, went beyond such an inquiry into purpose "at the programmatic level" and concluded that respondent's arrest was invalid because the particular prosecutors who sought it were motivated by reasons other than those for which the statute was intended. That is equivalent to "prob[ing] the minds of individual officers acting

at the scene"—precisely what *Edmond* does not condone. *Edmond*, 531 U.S. at 48.

b. The effect of the court's Fourth Amendment ruling was to invalidate the material witness statute as applied to the circumstances of this case. Although the court never explicitly declared that result, the as-applied unconstitutionality of Section 3144 necessarily follows from the court's holding that the Fourth Amendment prohibits an arrest that the material witness statute permits. The panel did not hold that the material witness statute itself limits material witness arrests to those in which the prosecutor acts with a non-investigative purpose. Rather, as the dissent pointed out, the court held that "*even if* the material witness warrant on which he was detained was objectively valid and supported by probable cause, the prosecutor's subjective intention to use the material witness warrant to accomplish other, law-enforcement objectives renders the government's conduct unconstitutional." App., *infra*, 70a.[3]

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[3] In an opinion concurring in the denial of rehearing en banc, Judge Smith, writing only for himself, argued that "[t]he material witness statute [itself] does not authorize arrests like the one in this case" and therefore that the panel had not "address[ed] the validity" of the law. App., *infra*, 113a-114a (emphasis omitted). But Judge Smith did not explain why the statute prohibits such an arrest when a neutral magistrate issues a warrant concluding that all of the statutory criteria have been satisfied, and in any event, his arguments do not square with the court's decision. Unlike Judge Smith, the court characterized respondent's claims under Section 3144 as resting on the false statements contained in the supporting affidavit, not on the allegedly improper purposes for which the warrant was sought. See *id.* at 47a-48a (panel opinion) ("[Respondent] claims that, in his case, the Mace Affidavit fails to demonstrate probable cause for either the materiality of his testimony or the reasons it would be impracticable to secure that testimony by sub-

The material witness statute has been in existence since 1789. See *Bacon* v. *United States*, 449 F.2d 933, 938 (9th Cir. 1971). All 50 states have enacted an analogous law. Until now, "[t]he constitutionality of this statute apparently has never been doubted." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929); see *Hurtado* v. *United States*, 410 U.S. 578, 588 (1973). The Ninth Circuit's implicit invalidation of such a longstanding and important Act of Congress provides an additional reason for this Court to grant review. See, *e.g.*, *United States* v. *Williams*, 128 S. Ct. 1830 (2008); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000).

2. The court of appeals committed serious error in holding that the Fourth Amendment violation was clearly established

The court of appeals "compound[ed] its error" in concluding that respondent's arrest violated the Fourth Amendment by also "holding that the right to be free from a detention under a pretextual material witness warrant was clearly established." App., *infra*, 128a. The Ninth Circuit's incorrect denial of qualified immunity to a cabinet-level official warrants this Court's review.

a. The doctrine of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). If at the

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poena. This allegation is the § 3144 claim: that, independent of the constitutionality of the use of § 3144 for investigatory purposes, al-Kidd's arrest failed to meet the statutory requirements set forth by Congress, and was therefore unlawful.").

time in question "officers of reasonable competence" could disagree on whether the alleged action violated the plaintiff's constitutional or statutory rights, "immunity should be recognized." *Malley*, 475 U.S. at 341.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Ibid.*; see *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

b. Under these standards, petitioner is plainly entitled to qualified immunity from suit on respondent's pretext claim. Even if the court of appeals were correct that the Fourth Amendment prohibited the execution of a material witness warrant when a prosecutor acted with investigative intent, that rule was not clearly established at the time of respondent's arrest. The court of appeals acknowledged that, in March 2003, no case had "squarely confronted the question of whether misuse of the material witness statute to investigate suspects violates the Constitution." App., *infra*, 41a. The only case the majority identified even remotely addressing the "specific context of [this] case," *Brosseau*, 543 U.S. at 198, was a district court decision that, in dicta in a footnote, warned that "[r]elying on the material witness statute to detain people * * * in order to prevent potential crimes is an illegitimate use of the statute." *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77 n.28

(S.D.N.Y. 2002), rev'd on other grounds, 349 F.3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005). As the dissent to the denial of rehearing en banc stated, "[t]he majority's assertion that three sentences of dicta in a footnote to a subsequently reversed district court opinion clearly established a right that the majority expended nearly three-thousand words describing is truly astonishing." App., *infra*, 129a.

The other sources on which the court of appeals relied in deeming respondent's purported Fourth Amendment rights "clearly established" do not support that conclusion. As Judge O'Scannlain explained, the "history and purposes of the Fourth Amendment" and the "definition of probable cause" are far too general to clearly establish the illegality of respondent's arrest in the particular circumstances. App., *infra*, 128a ("If [these sources are] sufficient clearly to establish how the Fourth Amendment applies in a particular setting, then how can *any* Fourth Amendment rule ever *not* be 'clearly established?'"). The court of appeals also reasoned that *Edmond* "should have been sufficient to put [petitioner] on notice that the material witness detentions," like administrative or special-needs searches, "would be similarly subject to an inquiry into programmatic purpose." *Id.* at 43a. But while the "programmatic purpose" test announced in cases such as *Edmond* may have been clearly established in the roadblock and administrative search contexts, it was not clearly established whether, much less how, that framework applied to arrests based on material witness warrants.

Indeed, at the time of respondent's arrest, at least one court of appeals had rejected the contention that an intent to investigate an individual as a suspect invalidates a material witness warrant. In *United States ex*

rel. Glinton v. *Denno*, 339 F.2d 872, 875 (2d Cir. 1964), cert. denied, 381 U.S. 929 (1965), a criminal defendant originally detained as a material witness argued that "it is irrelevant that the police complied with the technicalities of the material witness statute, because as the 'target' of the grand jury proceeding he could not have been summoned to testify, * * * and therefore could not be held as a witness." But as the court held, "[t]his argument has no merit." *Ibid.* The court deemed persuasive the decision in *People* v. *Perez*, 90 N.E. 2d 40, 46 (Ct. App. N.Y. 1949), in which the court upheld a situation almost identical to the practice alleged here: "While the police may have suspected defendant of the murder, they did not have enough evidence to hold him as a defendant until shortly before he confessed. His detention during that period was lawful because, in light of his admitted knowledge of many of the circumstances surrounding the murder, his commitment as a material witness was valid." *Ibid.*

3. The denial of qualified immunity on the pretext claim would significantly limit the use of the material witness statute

If permitted to stand, the decision below would seriously limit the circumstances in which prosecutors could invoke the material witness statute without fear of personal liability.

Individuals who have information critical to a prosecution often happen to be suspects in the underlying criminal investigation. And because such individuals face potential criminal exposure, they may become the subject of a material witness warrant if there is reason to believe they will flee the jurisdiction or refuse to respond to a subpoena. The decision below, however, sug-

gests that prosecutors will be subject to suit if they lack probable cause to charge such an individual but arrest him on a material witness warrant—even though that warrant is issued by a neutral judge based on an application that satisfies the requirements of 18 U.S.C. 3144.

The decision below therefore creates legal uncertainty in frequent applications of the material witness statute. To take one noteworthy example, federal agents initially detained Terry Nichols pursuant to a material witness warrant just days after the 1995 Oklahoma City bombing. See *United States* v. *McVeigh*, 940 F. Supp. 1541, 1548 (D. Colo. 1996). Although Nichols was implicated as a possible participant in the bombing because of his association with Timothy McVeigh, agents acknowledged that they lacked probable cause to hold Nichols in custody unless they arrested him as a material witness. *Ibid.* After further investigation following his arrest pursuant to the material witness statute, the government developed sufficient evidence to obtain a new arrest warrant on a criminal complaint alleging Nichols's direct involvement in the bombing. See *In re Material Witness Warrant*, 77 F.3d 1277, 1278-1279 (10th Cir. 1996). Under the reasoning of the decision below, Nichols would have had a cause of action for damages against (and presumably the right to seek discovery from) the prosecutors who obtained the material witness warrant based on an allegation that those officials pursued an investigative purpose.

Indeed, because the Ninth Circuit considered this Fourth Amendment principle "clearly established," prosecutors will likely avoid invoking the material witness statute in circumstances that could conceivably run afoul of the decision below. Thus, although the Ninth Circuit's analysis did not specify how it applies when the

prosecutor acts with mixed motives in seeking a material witness warrant, the fear of personal liability might dissuade prosecutors from obtaining such a warrant when they harbor any suspicion that the subject might be involved in criminal wrongdoing but do not yet have probable cause to bring criminal charges. The court of appeals' ruling will thus discourage prosecutors from employing the material witness statute in situations for which it was designed and in which the public interest favors its use.

C. The Court of Appeals Adopted Pleading Standards That Conflict With *Iqbal*

In addition to holding that petitioner lacked any type of immunity on the pretext claim, the court of appeals concluded that petitioner may be held responsible for alleged false statements and omissions in the affidavit submitted in support of the warrant to arrest respondent. That holding is inconsistent with this Court's decision in *Iqbal* and exposes a cabinet-level official to money damages for the conduct of his subordinates. This Court's review of that ruling is warranted.

a. *Iqbal* set forth two principles that govern this case. First, the Court explained that the Federal Rules of Civil Procedure require a plaintiff to provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 129 S. Ct. at 1949 (quoting *Bell At. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)); see *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998) (District courts should "insist" that a respondent "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury."). Second, the Court held that government officials may not be held responsible for the misconduct of their subordinates under broad theories of "supervisory liability." *Iqbal*,

129 S. Ct. at 1949. Instead, a supervisory official may be held liable under *Bivens* only if a respondent demonstrates that the supervisor "through [his or her] own individual actions, has violated the Constitution." *Id.* at 1948.

b. Contrary to the decision below, respondent's allegations do not satisfy the standards set forth in *Iqbal*. The complaint failed to plead any specific facts plausibly establishing that petitioner, the former Attorney General of the United States, through his own actions, participated in the making of allegedly false statements in the Mace affidavit. Instead, the complaint cites public statements by petitioner and other government officials declaring that the material witness statute was an "important investigative tool" that could be used to gather evidence and "tak[e] suspected terrorists off the street." App., *infra*, 7a, 24a (internal quotation marks omitted). But as the dissent recognized, those allegations at most "suggest [that petitioner] encouraged prosecutors to use valid material witness warrants as a means to accomplish other law-enforcement objectives." *Id.* at 89a-90a. They do not render plausible the conclusion on which the claim at issue rests—that petitioner required or encouraged the use of *false information* to obtain material witness warrants. Because respondent failed to allege that petitioner was either personally involved in that conduct or instituted a policy encouraging it, his claim amounts to an attempt to hold the former Attorney General liable for the alleged violation of Section 3144 by subordinate officials. *Iqbal* makes clear that such a broad claim of supervisory liability lacks merit.

Respondent also seeks damages on the allegation that petitioner "knew or reasonably should have known of the unlawful, excessive, and punitive manner in which

the federal material witness statute was being used in the aftermath of September 11, 2001," and that he was "legally responsible for taking any necessary corrective action in light of the mounting evidence of abuse." Compl. ¶¶ 137, 138. As an initial matter, those allegations are conclusory and therefore not entitled to the presumption of truth. *Iqbal*, 129 S. Ct. at 1949. But in any event, the mere assertion that petitioner knew of and acquiesced in false statements and omissions in applications filed by subordinates for material witness warrants would not by itself establish a constitutional violation. This Court has explained that the "factors necessary to establish a *Bivens* violation" by a supervisory official "will vary with the constitutional provision at issue." *Id.* at 1948. In *Iqbal*, for example, this Court held that the mere allegation that a supervisor knew about and acquiesced in purposeful discrimination by his subordinates failed to state a Fifth Amendment discrimination claim against the supervisor because "purpose rather than knowledge is required to impose *Bivens* liability * * * for unconstitutional discrimination." *Id.* at 1949. Similarly, here, the alleged constitutional violation requires proof that the officer acted deliberately or recklessly. See *Franks* v. *Delaware*, 438 U.S. 154, 164-172 (1978). An allegation that a supervisor knew of and acquiesced in such violations by subordinates does not meet this Court's rather stringent standard for establishing a constitutional violation.

c. Despite these deficiencies in the complaint, the court of appeals held that respondent's allegations were sufficient to state a supervisory liability claim against petitioner. That decision implicates the same concerns that animated the decision in *Iqbal*. There, this Court emphasized that supervisory officials "may not be held

accountable for the misdeeds of their agents" and that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." 129 S. Ct. at 1949. The court of appeals nevertheless reasoned that petitioner could be held liable for "setting in motion a series of acts by others * * * which [he] knew or reasonably should have known would cause others to inflict constitutional injury" and for "acquiescence in the constitutional deprivation by subordinates." App., *infra*, 30a. *Iqbal* makes clear, however, that the proper inquiry is not whether the supervisor was somehow involved in a constitutional deprivation, but whether that supervisor, through his own individual actions, "violat[ed] the Constitution." 129 S. Ct. at 1949. The court of appeals' decision, which imposed supervisory liability on a cabinet-level official in contravention of *Iqbal*, warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-36059

ABDULLAH AL-KIDD, PLAINTIFF-APPELLEE

v.

JOHN ASHCROFT, DEFENDANT-APPELLANT

Argued: Apr. 8, 2008
Filed: Sept. 4, 2009

Before: DAVID R. THOMPSON, CARLOS T. BEA, and MILAN D. SMITH, JR., Circuit Judges.

MILAN D. SMITH, JR., Circuit Judge:

According to the allegations of his first amended complaint, Plaintiff-Appellee Abdullah al-Kidd (al-Kidd), a United States citizen and a married man with two children, was arrested at a Dulles International Airport ticket counter. He was handcuffed, taken to the airport's police substation, and interrogated. Over the next sixteen days, he was confined in high security cells lit twenty-four hours a day in Virginia, Oklahoma, and then Idaho, during which he was strip searched on multiple occasions. Each time he was transferred to a different facility, al-Kidd was handcuffed and shackled about his wrists, legs, and waist. He was eventually released from custody by court order, on the conditions that he live

with his wife and in-laws in Nevada, limit his travel to Nevada and three other states, surrender his travel documents, regularly report to a probation officer, and consent to home visits throughout the period of supervision. By the time al-Kidd's confinement and supervision ended, fifteen months after his arrest, al-Kidd had been fired from his job as an employee of a government contractor because he was denied a security clearance due to his arrest, and had separated from his wife. He has been unable to obtain steady employment since his arrest.

Al-Kidd was not arrested and detained because he had allegedly committed a crime. He alleges that he was arrested and confined because former United States Attorney General John Ashcroft (Ashcroft), subordinates operating under policies promulgated by Ashcroft, and others within the United States Department of Justice (DOJ), unlawfully used the federal material witness statute, 18 U.S.C. § 3144, to investigate or preemptively detain him. Ashcroft asserts that he is entitled to absolute and qualified immunity against al-Kidd's claims. We hold that on the facts pled Ashcroft is not protected by either form of immunity, and we affirm in part and reverse in part the decision of the district court.

FACTS AND PROCEDURAL BACKGROUND[1]

A. al-Kidd

Plaintiff-Appellee al-Kidd was born Lavoni T. Kidd in Wichita, Kansas. While attending college at the University of Idaho, where he was a highly regarded run-

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[1] All facts are taken from al-Kidd's first amended complaint, unless otherwise indicated.

ning back on the University's football team, he converted to Islam and changed his name. In the spring and summer of 2002, he and his then-wife were the target of a Federal Bureau of Investigation (FBI) surveillance as part of a broad anti-terrorism investigation allegedly aimed at Arab and Muslim men.[2] No evidence of criminal activity by al-Kidd was ever discovered. Al-Kidd planned to fly to Saudi Arabia in the spring of 2003 to study Arabic and Islamic law on a scholarship at a Saudi university.

On February 13, 2003, a federal grand jury in Idaho indicted Sami Omar Al-Hussayen for visa fraud and making false statements to U.S. officials. On March 14, the Idaho U.S. Attorney's Office submitted an application to a magistrate judge of the District of Idaho, seeking al-Kidd's arrest as a material witness in the Al-Hussayen trial. Appended to the application was an affidavit by Scott Mace, a Special Agent of the FBI in Boise (the Mace Affidavit). The Mace Affidavit described two contacts al-Kidd had with Al-Hussayen: al-Kidd had received "in excess of $20,000" from Al-Hussayen (though the Mace Affidavit does not indicate what this payment was for), and al-Kidd had "met with Al-Hussayen's associates" after returning from a trip to Yemen. It also contained evidence of al-Kidd's contacts with officials of the Islamic Assembly of North America (IANA, an organization with which Al-Hussayen was affiliated),[3] including one official "who was recently ar

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[2] Al-Kidd is Muslim, but is African American and not of Arab descent.

[3] The IANA is identified in the Al-Hussayen indictment as an organization with the "purpose of Da'wa (proselytizing), which included the website dissemination of radical Islamic ideology the purpose of which

rested in New York." It ended with the statement, "[d]ue to al-Kidd's demonstrated involvement with the defendant . . . he is believed to be in possession of information germane to this matter which will be crucial to the prosecution." The Mace Affidavit did not elaborate on what "information" al-Kidd might have had, nor how his testimony might be "germane"—let alone "crucial"—to the prosecution of Al-Hussayen.

The affidavit further stated:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia. . . . It is believed that if al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

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was indoctrination, recruitment of members, and the instigation of acts of violence and terrorism."

The IANA's web site currently disseminates a list of goals which include, inter alia, to "[u]nify and coordinate the efforts of the different dawah oriented organizations in North America and guide or direct the Muslims of this land to adhere to the proper Islamic methodology"; "[s]pread the correct knowledge of Islam"; "[w]iden the horizons and understanding . . . among Muslims concerning different Islamic contemporary issues"; "[a]ssist the oppressed and tyrannized scholars, Islamic workers and Muslim masses in any locality"; and "[c]reate programs and institutions that will serve the English- speaking Muslims of North America." Islamic Assembly of N. Am., About IANA, at http://www.iananet.org/ about.htm (accessed June 10, 2009). Al-Hussayen, then a computer science graduate student at the University of Idaho, was accused of registering and running the IANA's web site.

In fact, al-Kidd had a round-trip, coach class ticket, costing approximately $1700. The Mace Affidavit omitted the facts that al-Kidd was a U.S. resident and citizen; that his parents, wife, and two children were likewise U.S. residents and citizens; and that he had previously cooperated with the FBI on several occasions when FBI agents asked to interview him. The magistrate judge issued the warrant the same day.

Pursuant to the material witness warrant, al-Kidd was arrested two days later at the ticket counter at Dulles International Airport. He was handcuffed and taken to the airport's police substation, where he was interrogated. Thereafter, he was detained for an aggregate of sixteen days at the Alexandria Detention Center in Virginia, the Oklahoma Federal Transfer Center, and the Ada County, Idaho, Jail. He was strip searched on multiple occasions and confined in the high-security unit of each facility. During transfer between facilities, al-Kidd was handcuffed and shackled about his wrists, legs, and waist. He was allowed out of his cell only one to two hours each day, and his cell was kept lit twenty-four hours a day, unlike other cells in the high-security wing.

On March 31, after petitioning the court, al-Kidd was ordered released, on the conditions that he live with his wife at his in-laws' home in Nevada, limit his travel to Nevada and three other states, report regularly to a probation officer and consent to home visits throughout the period of supervision, and surrender his passport. After almost a year under these conditions, the court permitted al-Kidd to secure his own residence in Las Vegas, Nevada, as al-Kidd and his wife were separating. He lived under these conditions for three more months before being released at the end of Al-Hussayen's trial,

more than fifteen months after being arrested.[4] In July 2004, al-Kidd was fired from his job. He alleges he was terminated when he was denied a security clearance because of his arrest. He is now separated from his wife, and has been unable to find steady employment. He was also deprived of his chance to study in Saudi Arabia on scholarship.

Al-Kidd was never called as a witness in the Al-Hussayen trial or in any other criminal proceeding.

B. Ashcroft

Defendant-Appellant Ashcroft was Attorney General of the United States during the relevant time period. According to al-Kidd's complaint, following the September 11, 2001 terrorist attacks, Ashcroft developed and promulgated a policy by which the FBI and DOJ would use the federal material witness statute[5] as a pretext "to

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[4] Al-Hussayen was not convicted of any of the charges brought against him. His trial ended in acquittal on the most serious charges, including conspiracy to provide material support to terrorists, 18 U.S.C. §§ 2339A, 2339B. After the jury failed to reach a verdict on the remaining lesser charges, the district court declared a mistrial. The government agreed not to retry Al-Hussayen and deported him to Saudi Arabia for visa violations.

[5] The federal material witness statute, 18 U.S.C. § 3144, provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Re-

arrest and detain terrorism *suspects* about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further." (Cited in, and emphasis added to, al-Kidd's complaint.)

To support this allegation, the complaint first quotes Ashcroft's own statement at a press briefing:

> Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist aliens. These measures form one part of the department's strategy to prevent terrorist attacks by taking *suspected terrorists* off the street . . . Aggressive detention of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying new attacks.

John Ashcroft, Attorney General, *Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force* (Oct. 31, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm (emphasis added in complaint). The complaint also cites internal DOJ memoranda quoted in a report by the DOJ's Office of the Inspector General (OIG Report),[6]

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lease of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[6] *See* Office of the Inspector Gen., U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003), available at http://www.usdoj.gov/oig/special/0306/full.pdf. The OIG Report's focus is the post 9/11 detention on immigration charges of Arab and Muslim aliens, and touches only incidentally on those held as material witnesses. Because the report, an official government document, is cited extensively throughout the com-

which describe the use of "aggressive arrest and detention tactics in the war on terror," OIG Report at 12, including the use of material witness warrants to confine aliens suspected of terrorist involvement, *id.* at 38-39, 75. The complaint also quotes the public statements of a number of DOJ and White House officials implying or stating outright that suspects were being held under material witness warrants as an alternative means of investigative arrest or preventative detention. In addition to this direct evidence, the complaint cites a number of press reports describing the detention of numerous Muslim individuals under material witness warrants. The complaint further alleges that the policies designed and promulgated by Ashcroft have caused individuals to be "impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena," in violation of the terms of § 3144.

In his complaint, al-Kidd links his personal detention to these broader policies not only through inference, but also through the statements of Robert Mueller, the Director of the FBI. On March 27, while al-Kidd was jailed in Idaho, Mueller testified before Congress, listing five "major successes" in the FBI's efforts toward "identifying and dismantling terrorist networks." The first was the capture of Khalid Shaikh Mohammed, iden-

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plaint, we deem it incorporated by reference, and take judicial notice of its entire contents. *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir.1999) (permitting incorporation by reference of documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading").

tified as "a key planner and the mastermind of the September 11th attack." The second was al-Kidd, identified as having been "arrested . . . en route to Saudi Arabia." The other three "successes" all involved individuals "indicted" or "charged" with some crime connected to terrorism. *See FBI's Fiscal Year (FY) 2004 Budget: Hearing Before the Subcommittee on the Departments of Commerce, Justice and State, House Appropriations Committee*, 108th Cong. (2003) (statement of Robert S. Mueller, III, Director, FBI), available at http://www.fbi.gov/congress/congress03/mueller 032703.htm (hereafter Mueller Testimony).

Finally, the complaint notes that "material witnesses have been routinely held in high security detention facilities." The OIG Report cites an Assistant U.S. Attorney who complained that the DOJ's Bureau of Prisons "did not distinguish between detainees who, in his view, posed a security risk and those detained aliens who were uninvolved witnesses." OIG Report at 20. It alleges "a general policy" of extensive mistreatment of material witnesses at the New York City Metropolitan Correctional Center (MCC). It cites a case, *United States v. Awadallah*, 202 F. Supp. 2d 55, 59-61 (S.D. N.Y. 2002) (*Awadallah I*), rev'd on other grounds, 349 F.3d 42 (2d Cir. 2003) (*Awadallah II*), which discusses the conditions of confinement of another putative material witness, Osama Awadallah, held in New York City. The complaint avers that Ashcroft "knew or reasonably should have known of the unlawful, excessive, and punitive manner in which the federal material witness statute was being used," and that such manner "would also foreseeably subject" detainees "to unreasonable and unlawful use of force, to unconstitutional conditions of confinement, and to punishment without due process."

C. Prior Proceedings

In March 2005, al-Kidd filed this lawsuit in Idaho federal district court. The first amended complaint was filed that November, naming as defendants, among others, Ashcroft, the United States, Mace and Gneckow (the two FBI agents named in the Mace Affidavit), and a number of government agencies and officers in their official capacities.[7] It sought damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), for violations of al-Kidd's rights under the Fourth and Fifth Amendments to the Constitution (a "Bivens action"), and for a direct violation of § 3144.

Ashcroft moved to dismiss under Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6). The district court first denied the 12(b)(2) motion, holding that al-Kidd had properly alleged facts sufficient to establish personal jurisdiction over Ashcroft in Idaho. Specifically, al-Kidd had alleged that Ashcroft "spear-headed the post September 11, 2001 practice . . . to use the material witness statute to detain individuals whom they sought to investigate," and that "Ashcroft either knew or should have known the violations were occurring and did not act to correct the violations." Next, the district judge denied the 12(b)(6) motion, rejecting Ashcroft's claims of absolute and qualified immunity. The district court held that "[t]he development and practice of using the material witness statute to detain individuals while in-

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[7] Ashcroft is the only defendant in this case who filed an interlocutory appeal of the district court's denial of the defendants' Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6) motions. Accordingly, none of al-Kidd's claims against the other defendants is before us.

vestigating possible criminal activity qualifies as police type investigative activity, not prosecutorial advocacy" for which absolute immunity is reserved. Turning to the claims for qualified immunity, the district court held that "the allegations against Mr. Ashcroft involve more than vicarious liability but assert claims involving Mr. Ashcroft's own knowledge and actions related to Mr. Kidd's alleged constitutional deprivations." The principal deprivation the district court mentioned was the allegation "that probable cause was not shown in the warrant application." The district court also rejected qualified immunity for the FBI agents.

Ashcroft filed a timely interlocutory appeal.

JURISDICTION AND STANDARD OF REVIEW

A. Failure to State a Claim

Section 1291 of U.S. Code Title 28 grants this court jurisdiction over "final decisions" of the district court. Ordinarily, the denial of a motion under Federal Rule of Civil Procedure 12(b)(6) would not constitute a "final decision." The district court's denial of absolute and qualified immunity, however, is a "final decision" for § 1291 purposes because these immunities are immunities from suit, not just from damages. *See Mitchell v. Forsyth*, 472 U.S. 511, 525, 527, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

As we have recognized in the past, interlocutory review of a Rule 12(b)(6) motion to dismiss puts our court in the difficult position of deciding "far-reaching constitutional questions on a nonexistent factual record." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). However, because Ashcroft chose to exercise

his right to appeal before a fuller record could be developed, we proceed as we must in a review of all Rule 12(b)(6) motions, accepting as true all facts alleged in the complaint, and drawing all reasonable inferences in favor of the plaintiff. *See Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). To avoid dismissal under Rule 12(b)(6), a plaintiff must aver in his complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, —U.S. —, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

We review de novo the district court's rulings on absolute and qualified immunity. *KRL v. Moore*, 384 F.3d 1105, 1110 (9th Cir. 2004); *Preschooler II v. Clark County Sch. Bd. of Trs.*, 479 F.3d 1175, 1179 (9th Cir. 2007).

B. Personal Jurisdiction

Ashcroft also argues that the district court does not have personal jurisdiction over him. Because denials of motions to dismiss for lack of personal jurisdiction are not ordinarily reviewable on interlocutory appeal, Ashcroft requests that this court exercise its "pendent appellate jurisdiction" to reach the question of personal jurisdiction.

In *Hendricks v. Bank of America, N.A.*, we summarized the criteria for the exercise of pendent appellate jurisdiction:

> Under 28 U.S.C. § 1292(a)(1), we may exercise . . . pendent jurisdiction over any otherwise nonappealable ruling that is "inextricably intertwined" with or "necessary to ensure meaningful review of" the or-

> der properly before us on interlocutory appeal. District court rulings are "inextricably intertwined" with a preliminary injunction when the legal theories on which the issues advance are so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue. We also construe Swint's "necessary to ensure meaningful review" language narrowly to require much more than a tangential relationship to the decision properly before us on interlocutory appeal.

408 F.3d 1127, 1134 (9th Cir. 2005) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)) (internal quotation marks, citations, and alterations omitted). Thus, Ashcroft must demonstrate that the issue of personal jurisdiction is either (1) "inextricably intertwined" with or (2) "necessary to ensure meaningful review of" the issues of absolute or qualified immunity, in order for us to exercise the pendent appellate jurisdiction he requests.

DISCUSSION

Al-Kidd asserts three independent claims against Ashcroft. First, he alleges that Ashcroft is responsible for a policy or practice under which the FBI and the DOJ sought material witness orders without sufficient evidence that the witness's testimony was material to another proceeding, or that it was impracticable to secure the witness's testimony-in other words, in violation of the express terms of § 3144 itself—and that al-Kidd was arrested as a result of this policy (the § 3144 Claim). Second, al-Kidd alleges that Ashcroft designed and im-

plemented a policy under which the FBI and DOJ would arrest individuals who may have met the facial statutory requirements of § 3144, but with the ulterior and allegedly unconstitutional purpose of investigating or preemptively detaining them, in violation of the Fourth Amendment (the Fourth Amendment Claim). Finally, al-Kidd alleges that Ashcroft designed and implemented policies, or was aware of policies and practices that he failed to correct, under which material witnesses were subjected to unreasonably punitive conditions of confinement, in violation of the Fifth Amendment (the Conditions of Confinement Claim).

Ashcroft argues that he is entitled to absolute prosecutorial immunity as to the § 3144 and Fourth Amendment Claims. He concedes that no absolute immunity attaches with respect to the Conditions of Confinement Claim. He also argues that he is entitled to qualified immunity from liability for all three claims.

A. Absolute Immunity

In *Bivens* actions and those taken under 42 U.S.C. § 1983,[8] "[m]ost public officials are entitled only to qualified immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). Prosecutors are entitled to *absolute* immunity, however, when they engage in activities "intimately associated with the judicial phase of the criminal process," *Imbler v. Pacht-*

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[8] The qualified and absolute immunity defenses to each are the same. *See Butz v. Economou*, 438 U.S. 478, 504, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

man, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), and done "in the course of [their] role as an advocate for the State," *Buckley*, 509 U.S. at 273, 113 S. Ct. 2606. They are entitled only to qualified immunity, however, when they perform investigatory or administrative functions, or are essentially functioning as police officers or detectives. *Id.* In addition, the United States Attorney General is not entitled to absolute immunity in the performance of his or her "national security functions." *Mitchell*, 472 U.S. at 520, 105 S. Ct. 2806. The burden to establish absolute immunity rests with the official seeking it:

> The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been "quite sparing" in our recognition of absolute immunity, and have refused to extend it any "further than its justification would warrant."

Burns v. Reed, 500 U.S. 478, 486-87, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 811, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "[I]f application of the principle is unclear, the defendant simply loses," and receives only the default of qualified immunity. *Buckley*, 509 U.S. at 281, 113 S. Ct. 2606 (Scalia, J., concurring).

To determine whether an action is "prosecutorial," and so entitled to absolute immunity, the Supreme Court has adopted a " 'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Id.* at 269, 113 S. Ct. 2606 (quoting *Burns*, 500 U.S. at 486, 111 S. Ct. 1934; *Forrester*, 484 U.S. at 229, 108 S. Ct. 538). "In *Imbler*,

the Court concluded that the 'reasons for absolute immunity appl[ied] with full force' to the conduct at issue because it was 'intimately associated with the judicial phase of the criminal process.'" *Van de Kamp v. Goldstein*, —U.S. —, 129 S. Ct. 855, 861, 172 L. Ed. 2d 706 (2009) (citing *Imbler*, 424 U.S. at 430, 96 S. Ct. 984). While the "duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," *Imbler*, 424 U.S. at 431 n.33, 96 S. Ct. 984, absolute prosecutorial immunity will be given "only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct," *Burns*, 500 U.S. at 494, 111 S. Ct. 1934.

As the Supreme Court has acknowledged, the distinction between the roles of "prosecutor" and "investigator" is not always clear. *See Imbler*, 424 U.S. at 431 n.33, 96 S. Ct. 984 ("Drawing a proper line between these functions may present difficult questions. . . . "). The Supreme Court has given us few bright lines,[9] and its cases on prosecutorial immunity have proceeded on a function-by-function basis. Thus, the Court has held that prosecutors receive absolute immunity for initiating a prosecution, *id.*, for presenting false or perjured testimony, *id.*, for appearing in court to apply for a search warrant, *Burns*, 500 U.S. at 492, 111 S. Ct. 1934, and for preparing and filing an information and a motion for an

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[9] One bright line the Supreme Court has given is that a "prosecutor neither is, nor should he consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274, 113 S. Ct. 2606. The converse, however, is not true: the mere presence of probable cause to have someone arrested "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *Id.* at 274 n.5, 113 S. Ct. 2606.

arrest warrant, *Kalina v. Fletcher*, 522 U.S. 118, 129, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). By contrast, prosecutors receive only qualified immunity for giving legal advice to the police, *Burns*, 500 U.S. at 496, 111 S. Ct. 1934, for investigating and fabricating physical evidence at a crime scene, *Buckley*, 509 U.S. at 274-75, 113 S. Ct. 2606 (involving a bootprint left at the scene of a crime), for holding a press conference, *id.* at 276-78, 113 S. Ct. 2606, and for acting as a complaining witness in support of a warrant application, *Kalina*, 522 U.S. at 130-31, 118 S. Ct. 502. *See also Van de Kamp*, 129 S. Ct. at 861.

In determining the scope of the functions to which absolute immunity extends, the Supreme Court has "generally looked for a historical or common-law basis for the immunity in question." *Mitchell*, 472 U.S. at 521, 105 S. Ct. 2806. The existence of a common-law immunity, however, is a necessary, but not sufficient, condition for the recognition of absolute immunity: "Even when we can identify a common-law tradition of absolute immunity for a given function, we have considered 'whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.'" *Buckley*, 509 U.S. at 269, 113 S. Ct. 2606 (quoting *Tower v. Glover*, 467 U.S. 914, 920, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984)).

Ashcroft contends that the decision to seek a material witness warrant is always a prosecutorial function. He has presented us with no historical evidence that a common-law tradition of absolute immunity from suit for prosecutors in seeking material witness arrests exists, and our own research has uncovered none, even though the practice of detaining witnesses who are not criminal

suspects dates back to at least the 1840s. *See generally* Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J.L. & Liberty 727 (2005). Other circuits, however, have held that the decision to seek a material witness warrant to secure a witness's testimony at trial is sufficiently related to judicial proceedings to be protected by absolute prosecutorial immunity. *See Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984); *Daniels v. Kieser*, 586 F.2d 64, 68-69 (7th Cir. 1978); *see also White ex rel. Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988) (suggesting in dicta that the decision to seek a material witness order is prosecutorial). *But see Odd v. Malone*, 538 F.3d 202, 217 (3d Cir. 2008) (holding "that the policies underlying the recognition of prosecutorial immunity do not apply with the same force" to detained material witnesses because "the aggrieved persons are unindicted third-party witnesses rather than criminal defendants"). In *Betts and Daniels*, the plaintiffs, who had been previously subpoenaed as witnesses, failed to appear on the day they were set to testify, and the prosecutor sought a material witness warrant. *Betts*, 726 F.2d at 80; *Daniels*, 586 F.2d at 66. The Seventh Circuit in *Daniels* held that "[b]ecause defendant was attempting to secure Daniels' presence at the resumption of the trial, we must consider that he was functioning as an advocate rather than as an investigator or administrator," and was therefore entitled to absolute immunity. 586 F.2d at 69; *see also Betts*, 726 F.2d at 81 (citing *Daniels*).

Al-Kidd does not contest that absolute immunity ordinarily attaches to the decision to seek a material witness warrant. He contends, rather, that in his case, the decision to arrest was an act in furtherance of an investi-

gative or national security function, for which the Attorney General may claim only qualified immunity. That is, al-Kidd claims he was arrested not in order to secure his testimony at Al-Hussayen's trial, but in order to detain, interrogate, and gather evidence against *him*, in particular. He notes that, in both *Betts* and *Daniels*, there was never any question that the material witness arrest was made for any reason other than to secure the witnesses' testimony at trial.

Ashcroft responds that any investigation into the purpose or motive behind the decision to arrest al-Kidd is inconsistent with the "functional" approach the Supreme Court has outlined. However, the cases he cites in support of this proposition are distinguishable. Those cases universally involve allegations that the otherwise prosecutorial action was secretly motivated by malice, spite, bad faith, or self-interest. *See, e.g., Bernard v. County of Suffolk*, 356 F.3d 495, 504 (2nd Cir. 2004) (alleging "racially invidious or partisan prosecutions"); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 779 (9th Cir. 2001) (involving prosecutor accused of initiating prosecution in order "to deny the plaintiffs access to public works construction job sites"); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) ("To foreclose immunity upon allegations that judicial and prosecutorial decisions were conditioned upon a conspiracy or bribery serves to defeat these policies."). None of these cases attempts to distinguish between a prosecutor's *investigative* or *national security* functions and his prosecutorial functions, which is the question here.

The cases distinguishing investigative and prosecutorial function take into account the goal of performing an action to determine function. In *Buckley v. Fitzsim-*

mons, the Supreme Court held that the prosecutors lacked absolute immunity for their actions before they had probable cause to arrest a suspect because "[t]heir mission at that time was entirely investigative in character." 509 U.S. at 274, 113 S. Ct. 2606. Even after a grand jury had been empaneled, the prosecutor's actions before it were not shielded by absolute immunity because "its immediate purpose was to conduct a more thorough investigation of the crime-not to return an indictment against a suspect whom there was already probable cause to arrest." *Id.* at 275, 113 S. Ct. 2606.[10]

This circuit has followed the Supreme Court's instruction. In *KRL v. Moore*, a grand jury had indicted the plaintiff, based on evidence obtained from an initial search warrant, on twenty-one criminal counts, mostly concerning environmental infractions relating to the removal of an underground fuel storage tank. 384 F.3d at 1108. The following month, however, prosecutors obtained two additional warrants to search for evidence with little relevance to the charges in the indictment. *Id.* at 1109. We held that the prosecutors were engaged,

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[10] Justice Kennedy would have gone even further, extending the inquiry beyond "immediate" purpose:

> Two actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions. It may be that a prosecutor and a police officer are examining the same evidence at the same time, but the prosecutor is examining the evidence to determine whether it will be persuasive at trial and of assistance to the trier of fact, while the police officer examines the evidence to decide whether it provides a basis for arresting a suspect. The conduct is the same but the functions distinct.

Id. at 289, 113 S. Ct. 2606 (Kennedy, J., concurring in part, dissenting in part).

at least in part, in investigative functions when they requested the second and third warrants, even though they already had probable cause as to those suspects for other crimes. We cited the prosecutors' investigatory purpose, which they had admitted both in depositions and on a talk radio program. *Id.* at 1114-15. "Thus, we conclude[d] that, because the warrant . . . was to further a 'stand-alone investigation' into environmental crimes, [defendants were] not entitled to absolute immunity from Plaintiffs' claim of judicial deception." *Id.* at 1115. By contrast, "the second search warrant had two goals: it sought evidence to prosecute the pending indictment against Womack, and it sought to investigate and uncover new crimes." *Id.* at 1111. We held that "to the extent the second search warrant sought evidence to prosecute the crimes charged in the indictment, [defendants'] review of the warrant prior to submission was intimately associated with the judicial process," and therefore entitled them to absolute immunity. *Id.* at 1112. Our focus on ends, rather than the labels attached to means, was explicit and effectively determinative.[11]

Likewise, in *Genzler v. Longanbach*, 410 F.3d 630, 638 (9th Cir. 2005), we noted that "[w]itness interviews

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[11] In KRL we limited our holding to search warrants, rather than arrest warrants. *Id.* at 1114. This distinction was based on the Supreme Court's rule that "a prosecutor does not serve as an advocate before probable cause to arrest anyone has been established." *Id.* (citing *Buckley*, 509 U.S. at 274, 113 S. Ct. 2606). The Supreme Court has been clear that probable cause to arrest is necessary, but not sufficient, to the prosecutorial function, and "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *Buckley*, 509 U.S. at 274 n.5, 113 S. Ct. 2606. At any rate, this distinction in dicta does nothing to detract from the teleological inquiry that was central to our holding.

may serve either an investigative or an advocacy-related function," and demonstrated how that function can be inferred from the circumstances of the interviews. In that case, the timing of the interviews, *id.* at 639, 642, as well as the "nature of the information obtained," *id.* at 640, led us to hold that "evidence in the record supports the conclusion that [the defendants] were engaged in police-type investigative work during" the witness interviews, *id.* at 642.[12]

Indeed, *Daniels* and *Betts*, while granting absolute immunity for material witness arrests, are entirely compatible with an inquiry into immediate purpose similar to that in *Genzler*. Both emphasized the close temporal and circumstantial connection between trial and seeking the arrest. *Betts*, 726 F.2d at 81; *Daniels*, 586 F.2d at 68-69. The Daniels court noted that "[i]n seeking to guarantee Daniels' presence at the trial through the material witness warrant, defendant was attempting to prove all elements charged in the indictment." *Id.* at 68. Other circuits have likewise used the language of purpose in determining function.[13]

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[12] The dissent argues that an individual's detention on a material witness warrant "is subject to continuing oversight, and errors may be corrected though the judicial process[,]" and thus obviates "'the need for damages actions to prevent unjust results.'" Dissent at 996 (citations omitted). The Third Circuit has recently held the opposite, finding that the plaintiffs, who had been detained on material witness statutes, had demonstrated the need for damages actions because "by virtue of their status as third-party witnesses, Plaintiffs are not entitled to the protections available to criminal defendants, including the appellate process." *Odd*, 538 F.3d at 217.

[13] *See, e.g.*, *Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 30-31 (1st Cir. 1995); *Parkinson v. Cozzolino*, 238 F.3d 145, 151 (2d Cir. 2001) ("There can be little doubt that conduct taken with the goal of affirming a conviction on appeal or obtaining a new conviction on re-trial falls within

They were justified in doing so. Even were we not constrained by our precedents in *KRL* and *Genzler*, the Supreme Court, in adopting a "functional" test, has necessarily required us to look beyond the labels a prosecutor attaches to his or her actions and examine their underlying ends. The very word *function* reflects, at least in part, a teleological perspective. *See, e.g.*, Oxford English Dictionary, *Function* (2d ed. 1989) (defining "function" as "[t]he special kind of activity proper to anything; the mode of action by which it fulfills its purpose"). In *Buckley*, the Supreme Court found it proper to inquire into the prosecutor's *mission* and *purpose*, the very inquiry that Ashcroft and the dissent in this case find distasteful. 509 U.S. at 274-75, 113 S. Ct. 2606.

Ashcroft's suggested approach, by contrast, would convert the Supreme Court's functional approach into a formalistic taxonomy of acts that are inherently either

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the traditional adversarial function of a prosecutor." (internal quotation marks omitted)); *Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir. 1995) ("To the extent that the creation of the videotapes fulfilled an investigatory purpose, Adago cannot claim absolute immunity."); *Cousin v. Small*, 325 F.3d 627, 635 (5th Cir. 2003) ("The interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause."); *Lomaz v. Hennosy*, 151 F.3d 493, 499 (6th Cir. 1998) ("The purpose for which they sought the warrant, therefore, was not primarily investigative, but was to obtain and preserve the evidence. We think that under these circumstances, the prosecutors were clearly 'preparing for the initiation of judicial proceedings.'" (quoting *Buckley*, 509 U.S. at 273, 113 S. Ct. 2606)); *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983); *Rivera v. Leal*, 359 F.3d 1350, 1354 (11th Cir. 2004) (finding absolute immunity because, inter alia, "there is no indication that Leal was trying to establish probable cause to arrest Appellant. In fact, the purpose of the hearing was to establish whether [another individual] was innocent.").

prosecutorial or investigative, regardless of what each act is really serving to accomplish. Because the application for the arrest warrant had the words "Material Witness" in the caption, Ashcroft seems to contend, our inquiry must stop there. Our dissenting colleague agrees, and would hold that so long as a material witness warrant is sought pursuant to a criminal trial, the decision to seek the material witness warrant should always be shielded by absolute immunity, regardless of whether its purpose was purely investigative. Dissent at 12351.

We disagree. Many tools and tactics available to prosecutors can serve either an investigatory or advocacy-related function. A grand jury may be used to return an indictment against a particular suspect, or to conduct a wide-ranging investigation. *Buckley*, 509 U.S. at 274, 113 S. Ct. 2606. A witness interview's function may be to gather evidence, or to prepare the witness to testify at imminent trial. *Genzler*, 410 F.3d at 638. And the power to arrest, even as a material witness, can be investigatory. As cited in al-Kidd's complaint, Michael Chertoff, then Assistant Attorney General for the DOJ's Criminal Division, described the material witness statute as "an important *investigative* tool in the war on terrorism. . . . Bear in mind that you get not only testimony-you get fingerprints, you get hair samples-so there's all kinds of *evidence* you can get from a witness." Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo: Nearly Half Held in War On Terror Haven't Testified*, Wash. Post, Nov. 24, 2002, at A1 (quoting Chertoff) (emphasis added).

Ashcroft argues that an inquiry into purpose cannot be cabined: a prosecutor filing charges against a foot soldier in an organized crime syndicate, for example,

might hope that the prospect of a lengthy incarceration will encourage the defendant to turn state's evidence, permitting investigation of those higher in the organization. A wide-ranging investigation into such motives would likely prove unworkable. It is for that reason that the Supreme Court has spoken only of "*immediate* purpose." *Buckley*, 509 U.S. at 275, 113 S. Ct. 2606 (emphasis added). As a common law court, we can rule only on the case before us. We believe, however, that while the prosecutor who files charges may hope, eventually, that the petty crook will implicate his boss, the *immediate* purpose of filing charges is to *begin* a *prosecution*—the better to pressure the defendant into providing information.

We hold, therefore, that when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another's trial, the prosecutor is entitled at most to qualified, rather than absolute, immunity.[14] We emphasize that our holding here does not rest upon an unadorned assertion of secret, unprovable motive, as the dissent seems to imply. Even before the Supreme

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[14] The dissent believes that such an inquiry is undesirable because of the incentives it creates. Dissent at 999-1000. Judge Bea states that our inquiry may make a prosecutor go to trial against a defendant simply to ensure his actions will not be subject to attack in a future lawsuit. We disagree. First, prosecutors often make choices regarding prosecutorial strategy that may be in tension with personal liability, see *Kalina*, 522 U.S. at 130-31, 118 S. Ct. 502, since all actions taken by a prosecutor are not entitled to absolute immunity. Second, we note that creating an incentive for a prosecutor to utilize a material witness he/she has detained for the very purpose alleged in his/ her affidavit is not an undesirable incentive, and certainly not dispositive to the immediate purpose inquiry.

Court's decision in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, it was likely that conclusory allegations of motive, without more, would not have been enough to survive a motion to dismiss. *See, e.g., Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (facts pled must be accepted as true, but conclusory allegations need not be). *Twombly*'s general requirement that "[f]actual allegations must be enough to raise a right to relief above the speculative level," 550 U.S. at 555, 127 S. Ct. 1955, applies with equal force to allegations that a prosecutor's actions served an investigatory function. In this case, however, al-Kidd has averred ample facts to render plausible the allegation of an investigatory function:

- Al-Kidd's arrest was sought a month *after* Al-Hussayen was indicted, and more than a year before trial began, temporally distant from the time any testimony would have been needed. *See Genzler*, 410 F.3d at 639 ("The timing of evidence gathering is a relevant fact in determining how closely connected that conduct is to the official's core advocacy function. . . . "). *Cf. Betts*, 726 F.2d at 81 (arrest warrant issued day of trial); *Daniels*, 586 F.2d at 68 (same).

- The FBI had previously investigated and interviewed al-Kidd, but had never suggested, let alone demanded, that he appear as a witness. *Cf. Betts*, 726 F.2d at 80 (subpoena issued; prosecutor called witness day before trial to remind her that trial was to begin the next day); *Daniels*, 586 F.2d at 65 (plaintiff had already been served one subpoena; second subpoena was misplaced by U.S. Marshal).

- The FBI conducted lengthy interrogations with al-Kidd while in custody, including about matters apparently unrelated to Al-Hussayen's alleged visa violations. *Cf. Genzler*, 410 F.3d at 641-43 (nature of questions asked witnesses relevant to whether interview served investigative function).

- Al-Kidd *never actually* testified for the prosecution in Al-Hussayen's or any other case, despite his assurances that he would be willing to do so. *Cf. Betts*, 726 F.2d at 80 ("On Monday morning the trial proceeded and the prosecutor called plaintiff as his first witness."); *Daniels*, 586 F.2d at 66 ("Plaintiff subsequently testified as a government witness when Phoenix's trial resumed.").

All of these are objective indicia, similar to those we cited in *Genzler*, 410 F.3d at 641-43, that al-Kidd's arrest functioned as an investigatory arrest or national security-related preemptive detention, rather than as one to secure a witness's testimony for trial. Finally:

- Ashcroft's immediate subordinate, FBI Director Mueller, testified before Congress that al-Kidd's *arrest* (rather than, say, the obtaining of the evidence he was supposedly going to provide against Al-Hussayen) constituted a "major success[ ]" in "identifying and dismantling terrorist networks." Mueller Testimony, *supra*. *Cf. KRL*, 384 F.3d at 1114-15 (prosecutor contemporaneously admits on radio program that follow-up search warrant was part of "a stand-alone investigation").

We conclude that the practice of detaining a material witness in order to investigate him, on the facts alleged by al-Kidd, fulfills an investigative function.

B. Qualified Immunity

The Attorney General may still be entitled to qualified immunity for acts taken in furtherance of an investigatory or national security function. Before addressing each of al-Kidd's claims in turn, we address the general requirements of qualified immunity applicable to all his claims.

1. Qualified Immunity Generally

Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal quotation marks omitted). It is within our "sound discretion" to address these two prongs in any sequence we see fit. *Pearson v. Callahan*, —U.S. —, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009). Here, we apply the two-step *Saucier* analysis in the traditional sequence, as this sequence "promotes the development of constitutional precedent," which is especially valuable in addressing constitutional questions such as the one at hand, "that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* at 818.

2. Qualified Immunity for Supervisors

Because qualified immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, 105 S. Ct. 2806, courts have also evaluated the sufficiency of the allegations of the defendant's personal involvement in the deprivation of the right at the second stage of the qualified immunity analysis. Neither a 42 U.S.C. § 1983 nor a *Bivens* action will hold a supervisor strictly vicariously liable for the actions of his subordinates under a theory of respondeat superior. *Iqbal*, 129 S. Ct. at 1948. Although this question is a part of the substance of § 1983 and *Bivens* liability, it is also a proper component of the qualified immunity inquiry:

> In conducting qualified immunity analysis . . . , courts do not merely ask whether, taking the plaintiff's allegations as true, the plaintiff's clearly established rights were violated. Rather, courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights. For instance, an allegation that Defendant A violated a plaintiff's clearly established rights does nothing to overcome Defendant B's assertion of qualified immunity, absent some allegation that Defendant B was responsible for Defendant A's conduct.

Hope, 536 U.S. at 751 n.9, 122 S. Ct. 2508 (Thomas, J., dissenting). In *Kwai Fun Wong v. United States*, we, on interlocutory appeal, dismissed part of a *Bivens* action for failure to state a claim where the complaint "fail[ed] to identify what role, if any, each individual defendant had in placing [the plaintiff] in detention." 373 F.3d at 966.

Al-Kidd's complaint does not allege that Ashcroft was directly involved in the decision to detain al-Kidd. But "direct, personal participation is not necessary to establish liability for a constitutional violation." *Id.* Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (internal quotation marks omitted). Any one of these bases will suffice to establish the personal involvement of the defendant in the constitutional violation.

3. The Fourth Amendment Claim

Al-Kidd's complaint principally alleges that Ashcroft "developed, implemented and set into motion a policy and/or practice under which the FBI and DOJ would use the material witness statute to arrest and detain terrorism *suspects* about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further." Al-Kidd argues that using § 3144 to detain suspects to investigate them violates the Fourth Amendment's guarantee against unreasonable seizure.

a. Al-Kidd's Fourth Amendment Rights Were Violated.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

We have previously held that material witness arrests are "seizures" within the meaning of the Fourth Amendment and are therefore subject to its reasonableness requirement. *Bacon v. United States*, 449 F.2d 933, 942 (9th Cir. 1971).

The Supreme Court has never held that detention of innocent persons as material witnesses is permissible under the Fourth Amendment,[15] and this circuit, in one of the few circuit-level cases to examine the validity of material witness detentions under the Fourth Amendment, declined to reach the facial constitutionality of the predecessor of § 3144. Cir. 2 at 941. Al-Kidd does not

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[15] Two decisions have held that it does not violate other provisions of the Constitution. *See Hurtado v. United States*, 410 U.S. 578, 589-90, 93 S. Ct. 1157, 35 L. Ed. 2d 508 (1973) (Fifth and Thirteenth Amendments); *New York v. O'Neill*, 359 U.S. 1, 6-7, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959) (Privileges or Immunities Clause of the Fourteenth Amendment). Dicta in two other cases suggest that the practice is ordinarily permissible. *See Stein v. New York*, 346 U.S. 156, 184, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953), *overruled by Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) ("The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 616-17, 49 S. Ct. 452, 73 L. Ed. 867 (1929) ("[A] court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming. . . . The constitutionality of this statute apparently has never been doubted.").

contend that § 3144 is facially unconstitutional. Rather, he contends that it is intended to be a "limited exception" to the ordinary rule that arrests may only be made upon probable cause of criminal wrongdoing. He further claims that its use for any purpose other than obtaining testimony, and specifically to investigate or preemptively detain terrorism suspects, without probable cause, is unconstitutional. Ashcroft contends that this position is inconsistent with *Whren v. United States*'s rule that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). But arrests of material witnesses are neither "ordinary,"[16] nor involve "probable cause" as that term has historically been understood.

Whren rejected only the proposition that "ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to *believe that a violation of law has occurred*." *Id.* at 811, 116 S. Ct. 1769 (emphasis added). Indeed, *probable cause*, since before the founding, has always been a term of art of criminal procedure. As Chief Justice Marshall wrote:

> [T]he term "probable cause," according to its usual acceptation, means less than evidence which would

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[16] In 2003, the year of al-Kidd's arrest, material witness arrests made up only 3.6% of all arrests by federal law enforcement agents. Of those, 92.3% were made by the former Immigration and Naturalization Service, typically to detain illegally smuggled aliens for testimony against their smugglers before removal. *See, e.g., Aguilar-Ayala v. Ruiz*, 973 F.2d 411 (5th Cir. 1992). Less than 0.3% of arrests by non-immigration federal law enforcement agents were material witness arrests. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2003*, NCJ No. 210299 (2005), available at http:// www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0301.pdf, at 18.

> justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the Court must understand the term to have been used by Congress.

Locke v. United States, 11 U.S. (7 Cranch) 339, 348, 3 L. Ed. 364 (1813). Its most famous modern formulation comes from Justice Stewart's opinion in *Beck v. Ohio*:

> Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). This definition has been reiterated in Supreme Court cases over the decades:

> This Court repeatedly has explained that "probable cause" to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.

Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) ("If an officer has probable cause to believe

that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Probable cause has both a burden-of-proof component (facts sufficient to make a reasonable person believe . . .) and a substantive component (. . . that the suspect is involved in crime). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949) (citations and quotation marks omitted). An arrest of a material witness is not justified by probable cause because the two requirements of § 3144 (materiality and impracticability) do not constitute the elements of a crime.[17]

The dissent disputes this traditional definition of probable cause, contending that no substantive component exists and that *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978), prevents an inquiry into whether wrongdoing has occurred. Dissent at 12338. The dissent misreads *Zurcher* and confuses the different requirements for probable cause in situations for the seizure of a person and the probable cause required for a search warrant. As *Zurcher* explains, "while probable cause for arrest requires information justifying a reasonable belief that a crime has been committed and that a particular person committed it, a search warrant may be issued on a complaint which does not identify any particular person as the likely of-

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[17] One *may* commit a crime by ignoring or disobeying a subpoena. 18 U.S.C. § 401(3) (authorizing criminal contempt for "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command"). This was not the case here, where al-Kidd does not ever seem to have been subpoenaed.

fender." *Id.* at 556 n. 6, 98 S. Ct. 1970. Thus, the dissent's analogy to *Zurcher* is inapplicable, and nothing in our holding here contravenes *Zurcher*.

Further, our decision in *Bacon v. United States* is not to the contrary. In *Bacon*, we held that the two criteria for arrest in the predecessor of § 3144, materiality of the witness's testimony and impracticability of securing the witness's testimony by subpoena, must be met by "probable cause" to arrest the material witness. 449 F.2d at 943.[18] We stated that "[t]hese requirements are reasonable, and if they are met, an arrest warrant may issue." *Id.* *Bacon* cannot be read for the proposition that this alone satisfies the "probable cause" requirement of the Fourth Amendment, however, and even if it could, such a reading has been superseded by the dozens of subsequent Supreme Court reaffirmations of the tra-

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[18] The petitioner in *Bacon* was detained as a material witness in a grand jury proceeding. We stated that "a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy" the materiality criterion in the case of a witness for a grand jury, which maintains broad powers of investigation and whose proceedings are secret. 449 F.2d at 943. *Bacon* reserved the question of what showing is necessary "in the case of a witness who is to testify at a trial." *Id.* We currently see no reason that the showing of materiality as to the witness in a trial, where proceedings are public and bound by the charges in the indictment, should be any different from the showing required for impracticability.

Because Al-Hussayen had already been indicted by the time of al-Kidd's arrest, we do not address whether *Bacon*'s statement that grand juries are "criminal proceedings" within the meaning of the material witness statute was a holding or *obiter dicta*. *Compare Awadallah I*, 202 F. Supp. 2d at 71 (holding the *Bacon* language to be dicta because it was unnecessary to the conclusion that the affidavit was insufficient to show impracticability), with *In re Application for a Material Witness Warrant*, 213 F. Supp. 2d 287, 291 (S.D. N.Y. 2002) (finding the same language to be a holding).

ditional definition of probable cause. Rather, *Bacon* simply borrowed, by analogy, some of the *procedural* protections traditionally afforded to criminal suspects, including the burden-of-proof component of probable cause. We therefore required that the elements of the material witness statute be shown by "probable cause," not because that, in itself, satisfies the Fourth Amendment's "probable cause" requirement, but because permitting arrests only upon establishing the elements by that burden of proof was "reasonable" under the Fourth Amendment. *Id.*

Because material witness arrests are seizures without suspicion of wrongdoing, the *Whren* rule, that subjective motivation is irrelevant in the presence of probable cause, does not apply to our Fourth Amendment analysis in this case. In *City of Indianapolis v. Edmond*, the Supreme Court struck down motor vehicle checkpoints set up "to interdict unlawful drugs" carried by those stopped. 531 U.S. 32, 35, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000). The Court explained that "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion. Accordingly, *Whren* does not preclude an inquiry into programmatic purpose in such contexts." *Id.* at 45-46, 121 S. Ct. 447. The Court went on to clarify:

> our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level.
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> . . . [W]e examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in

> a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful. As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.

Id. at 46-47, 121 S. Ct. 447 (citation omitted).

Edmond, therefore, establishes that "programmatic purpose" is relevant to Fourth Amendment analysis of programs of seizures without probable cause.[19] It further establishes that if that programmatic purpose is criminal investigation, it is fatal to the program's constitutionality: "the constitutional defect of the program is

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[19] The dissent contends that *United States v. Villamonte-Marquez*, 462 U.S. 579, 103 S. Ct. 2573, 77 L. Ed. 2d 22 (1983), does not allow such a broad reading of *Edmond*. Dissent at 989-90. *Villamonte-Marquez*, however, is factually limited to searches of sea vessels located in waters providing ready access to the open sea. 462 U.S. at 581, 103 S. Ct. 2573 ("[W]e are concerned only with the more narrow issue" of whether "the Fourth Amendment is offended when Customs officials . . . board for inspection of documents a vessel that is located in waters providing ready access to the open sea"). The Supreme Court has expressly distinguished searches of such sea vessels from other types of searches—those of automobiles on land, for example. *Id.* at 584-92, 103 S. Ct. 2573. Only under the most contorted reading of *Villamonte-Marquez* would that case also apply to the pretextual detention of a person under a material witness statute.

that its primary purpose is to advance the general interest in crime control." *Id.* at 44, 121 S. Ct. 447. The following year's *Ferguson v. City of Charleston* held unconstitutional a program of mandatory drug testing of maternity patients because "the immediate objective of the searches was to generate evidence for law enforcement purposes" against the women tested. 532 U.S. 67, 83, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001). By contrast, in *Illinois v. Lidster*, the Court *upheld* seizures at a motor vehicle checkpoint set up by the police a week after a hit-and-run accident, "at about the same time of night and at about the same place" as the accident, where the checkpoint was "designed to obtain more information about the accident from the motoring public." 540 U.S. 419, 422, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004). The Court in *Lidster* distinguished the seizure in *Edmond* on the basis that, in *Lidster*:

> the stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

Id. at 423, 124 S. Ct. 885. As Justice Stevens wrote in concurrence, "[t]here is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier." *Id.* at 428, 124 S. Ct.

885 (Stevens, J., concurring in part, dissenting in part).[20] That is precisely the distinction at work here, and the reason we hold that Ashcroft's policy as alleged was unconstitutional.

Al-Kidd alleges that he was arrested without probable cause pursuant to a general policy, designed and implemented by Ashcroft, whose programmatic purpose was not to secure testimony, but to investigate those detained. Assuming that allegation to be true, he has alleged a constitutional violation. Contrary to the dissent's alarmist claims, we are not probing into the minds of individual officers at the scene; instead, we are inquiring into the programmatic purpose of a general policy as contemplated by *Edmond*, 531 U.S. at 47, 121 S. Ct. 447, and finding that the purpose of the policy alleged in al-Kidd's first amended complaint is impermissible under the Fourth Amendment.

Further, the dissent's assertion that we are suggesting "the only governmental interest of sufficient weight

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[20] We are mindful of the difference between a traffic stop and a material witness arrest. The material witness is subject to a seizure an order of magnitude greater than that at issue in *Lidster*, where the stops were "brief," and were of drivers in their cars. (As the Court noted, the "Fourth Amendment does not treat a motorist's car as his castle." 540 U.S. at 424, 124 S. Ct. 885.) An individual seized as a material witness is taken from her home and daily affairs and confined to a small space for a period of time measured not in minutes or even hours, but ranging from days to months. Al-Kidd disclaims any attack on material witness detention generally, and we are in any event bound by *Bacon*'s determination that the material witness statute, backed by a "probable cause" requirement to guarantee particularity, has struck a "reasonable" balance between the witness's interest in liberty and the government's need for testimony. But the severity of the deprivation of liberty in material witness arrests only militates for correspondingly more severe judicial scrutiny of its application.

to justify an arrest is a reasonable belief that the arrestee has committed a crime" grossly mischaracterizes our holding. Dissent at 12336. To the contrary, we recognize that when the material witness statute is genuinely used to secure "testimony of a person . . . material in a criminal proceeding" because "it is shown that it may become impracticable to secure the presence of the person by subpoena," 18 U.S.C. § 3144, a showing of probable cause is not required. Our holding does nothing to curb the use of the material witness statute for its stated purpose. *What we do hold is that probable cause—including individualized suspicion of criminal wrongdoing—is required when 18 U.S.C. § 3144 is not being used for its stated purpose, but instead for the purpose of criminal investigation.* We thus do not render the material witness statute "entirely superfluous," dissent at 989; it is only the *misuse* of the statute, resulting in the detention of a person without probable cause for purposes of criminal investigation, that is repugnant to the Fourth Amendment.

All seizures of criminal suspects require probable cause of criminal activity. To use a material witness statute pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment. *Accord Awadallah II*, 349 F.3d at 59 ("[I]t would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established.").

b. Al-Kidd's Right Was "Clearly Established."

Ashcroft alternatively contends that if we conclude that the use of material witness orders for investigatory purposes violates the Constitution, we should still grant

him qualified immunity because that constitutional right was not "clearly established" in March 2003, when al-Kidd was arrested. We disagree.

In March 2003, no case had squarely confronted the question of whether misuse of the material witness statute to investigate suspects violates the Constitution. Both the complaint and *Amici* Former Federal Prosecutors note the unprecedented nature of Ashcroft's alleged material witness policy, and thus it is unsurprising that published cases directly on point are lacking. However, this alone is not enough to give Ashcroft immunity: "'while there may be no published cases holding similar policies [un]constitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue.'" *Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005) (quoting *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002)). Indeed, as the Supreme Court has stated:

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent."

Hope, 536 U.S. at 739, 122 S. Ct. 2508 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)) (internal citations omitted). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741, 122 S. Ct. 2508.

What *was* clearly established in March 2003? No federal appellate court had yet squarely held that the federal material witness statute satisfied the requirements of the Fourth Amendment. Even our decision in *Bacon* held only that it was unconstitutional as applied to the petitioner. 449 F.2d at 943. What *obiter dicta* existed on material witness detention, however, clearly linked its justification only to the state's overriding need to compel testimony in criminal cases.[21] Even dicta, if sufficiently clear, can suffice to "clearly establish" a constitutional right. *See Hope*, 536 U.S. at 740-41, 122 S. Ct. 2508. But there is more.

The definition of probable cause, as set forth in *Beck v. Ohio*, was certainly clearly established. While the Supreme Court's decision *permitting* suspicionless seizures in some circumstances in *Lidster* had not yet been decided, its decision in *Edmond*, stating that an investigatory programmatic purpose renders a program of sei-

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[21] *See, e.g., Stein*, 346 U.S. at 184, 73 S. Ct. 1077 (1953) ("The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."); *Barry*, 279 U.S. at 617, 49 S. Ct. 452 (stating that the material witness statute then in effect "provides that any federal judge . . . may have [material witnesses] brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed *for the purpose of giving his testimony*") (emphasis added); *Bacon*, 449 F.2d at 942 ("The public interest [in detaining witnesses] will be protected if grand jury witnesses come forth to provide testimony concerning the possible commission of crimes."); *Awadallah I*, 202 F. Supp. 2d at 77 ("The only *legitimate* reason to detain a grand jury witness is to aid in 'an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.'" (quoting *United States v. Calandra*, 414 U.S. 338, 343-44, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974))).

zures without probable cause unconstitutional, had been decided two and a half years earlier. 531 U.S. at 47, 121 S. Ct. 447. That holding was reaffirmed the following year in *Ferguson*, 532 U.S. at 81-83, 121 S. Ct. 1281, which highlighted the close connection between the investigative "programmatic purpose" and the search scheme that was ruled unconstitutional. Those decisions, which emphasized that an investigatory programmatic purpose would invalidate a scheme of searches and seizures without probable cause, should have been sufficient to put Asheroft on notice that the material witness detentions—involving a far more severe seizure than a mere traffic stop—would be similarly subject to an inquiry into programmatic purpose.

Moreover, the history and purposes of the Fourth Amendment were known well before 2003:

> The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. "The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest."

Dunaway v. New York, 442 U.S. 200, 213, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979) (quoting *Henry v. United States*, 361 U.S. 98, 100-01, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959)) (internal citation omitted). The Fourth Amendment

"reflect [s] the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford v. Texas*, 379 U.S. 476, 481, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

The facts alleged of al-Kidd's arrest, that he was arrested because he was associated with the webmaster of an allegedly jihadist website, demonstrate the continued relevance of the Founders' concerns. The Fourth Amendment was, in large measure, a direct response to the so-called "Wilkes cases." As summarized by the Supreme Court:

> The *Wilkes* case arose out of the Crown's attempt to stifle a publication called The North Briton, anonymously published by John Wilkes, then a member of Parliament—particularly issue No. 45 of that journal. Lord Halifax, as Secretary of State, issued a warrant ordering four of the King's messengers "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, * * * and them, or any of them, having found, to apprehend and seize, together with their papers." "Armed with their roving commission, they set forth in quest of unknown offenders; and unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect." Holding that this was "a ridiculous warrant against the whole English nation," the Court of Common Pleas

> awarded Wilkes damages against the Secretary of State.

Id. at 483, 85 S. Ct. 506 (alteration in original) (footnotes omitted). Within three days of the issuance of Halifax's general warrants, forty-nine people had been arrested, none of whom was named in the warrant, but all of whom were alleged associates of the allegedly seditious pamphleteer. Nelson B. Lasson, *The Fourth Amendment to the Constitution* 43-44 (1937). The warrant authorizing al-Kidd named him in particular, and so was not a general warrant in that sense. But the result was the same: gutting the substantive protections of the Fourth Amendment's "probable cause" requirement and giving the state the power to arrest upon the executive's mere suspicion.

Finally, months before al-Kidd's arrest, one district court in a high-profile case had already indicated, in the spring of 2002, that *§ 3144 itself* should not be abused as an investigatory anti-terrorism tool, calling out Asheroft by name:

> Other reasons may motivate prosecutors and law enforcement officers to rely upon the material witness statute. Attorney General John Asheroft has been reported as saying: "Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks." *Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute.* If there is probable cause to believe an individual has committed a crime or is conspiring to commit a crime, then the government may

lawfully arrest that person, but only upon such a showing.

Awadallah I, 202 F. Supp. 2d at 77 n.28 (citation omitted, first emphasis added). The statement was dicta in a footnote of a district court opinion. But it was categorical, and it addressed *exactly* what al-Kidd alleges happened ten months after the opinion was first issued. It is difficult to imagine what, in early 2003,[22] might have given John Ashcroft "fair[er] warning" that he could be haled into court for his alleged material witness policies. Hope, 536 U.S. at 741, 122 S. Ct. 2508.

We therefore hold that al-Kidd's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established in 2003. Although Ashcroft has raised in this appeal neither a national security nor an exigency defense to al-Kidd's action, we note that we are mindful of the pressures under which the Attorney General must operate. We do not intend to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). But, as the Supreme Court has aptly noted, qualified immunity must

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[22] Mr. Awadallah was detained shortly after the September 11 attacks. *Awadallah II*, 349 F.3d at 45 (Sept. 20, 2001). He sought his release almost immediately. *Id.* at 47 (Sept. 25, 2001). By April of 2003, his case had finally reached the court of appeals. Given the speed of our appellate process, it would have been almost impossible for any authority higher than a district court to have opined on defendant's material witness policies before March 2003. As noted above, the Second Circuit later indicated, in dicta of its own, its agreement with the district court's statement on this question, even as it reversed the district court's holding and remanded the case. *Id.* at 59.

> not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . . . " This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

Mitchell, 472 U.S. at 524, 105 S. Ct. 2806 (quoting *Harlow*, 457 U.S. at 819, 102 S. Ct. 2727) (internal citations omitted).

4. The § 3144 Claim

In addition to alleging that Ashcroft misused § 3144 for unconstitutional purposes the statute did not intend, al-Kidd alleges that his arrest violated the terms of § 3144 itself. Section 3144 authorizes the arrest of material witnesses only if (1) "the testimony of a person is material in a criminal proceeding," and (2) "it may become impracticable to secure the presence of the person by subpoena." *Bacon v. United States* requires that these elements be shown by presenting the judicial officer with an affidavit showing "the underlying facts or circumstances from which the judicial officer could find probable cause." 449 F.2d at 943. Al-Kidd claims that, in his case, the Mace Affidavit fails to demonstrate probable cause for either the materiality of his testimony or

the reasons it would be impracticable to secure that testimony by subpoena. This allegation is the § 3144 claim: that, independent of the constitutionality of the use of § 3144 for investigatory purposes, al-Kidd's arrest failed to meet the statutory requirements set forth by Congress, and was therefore unlawful.

Although the arrest was conducted pursuant to a warrant issued by a magistrate judge, we allow challenges to the validity of searches and seizures conducted pursuant to a warrant if the affidavit in support of the warrant included false statements or material omissions that were made intentionally or recklessly. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985) (extending *Franks* to material omissions); *see also Awadallah I*, 349 F.3d at 64-65 & n.17 (assuming, without deciding, that *Franks* applies to a material witness warrants and conducting the *Franks* analysis). Asheroft does not contest that such an inquiry would be appropriate, or that reckless or intentional misstatements or omissions could, if proven, constitute a valid claim of the violation of a clearly established right. Rather, he argues that al-Kidd has not pled sufficient acts or omissions to establish supervisory liability for the § 3144 Claim.[24]

Prior to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, we held that a plaintiff "does not need to show with great specificity how each defendant contributed to the violation of his

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[24] As discussed previously, "a plaintiff must plead that each Government-official defendant, though the official's own individual actions" were involved in the constitutional deprivations. *Iqbal*, 129 S. Ct. at 1948.

constitutional rights. Rather, he must state the allegations generally so as to provide notice to the defendants and alert the court as to what conduct violated clearly established law." *Preschooler II*, 479 F.3d at 1182. Ashcroft argues that al-Kidd's allegations as to Ashcroft's personal involvement in the § 3144 Claim amount simply to "sheer speculation," and are insufficient to state a claim under *Twombly*.

In *Twombly*, the Supreme Court held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15 U.S.C. § 1. 550 U.S. at 548, 127 S. Ct. 1955. While the Court expressly disclaimed any intention to require general "heightened fact pleading of specifics," *id.* at 570, 127 S. Ct. 1955, and reaffirmed the holding of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (rejecting a fact pleading requirement for Title VII employment discrimination), it stated that, to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must aver "enough facts to state a claim to relief that is plausible on its face," *id.* at 570, 122 S. Ct. 992.

Since the argument and initial briefing in this case, the Supreme Court, in *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), has clarified *Twombly*'s reach to cases such as these. *Iqbal* concerned claims against a number of defendants, including FBI Director Mueller and Attorney General Ashcroft, made by Javaid Iqbal, a Muslim Pakistani who was part of the mass roundup of Muslim aliens on immigration charges following the September 11 attacks. Iqbal claimed that Mueller and Ashcroft were responsible for selectively placing detainees in their restrictive condi-

tions on account of their race and religion. *Id.* at 1951. The Supreme Court found the allegations in the complaint insufficient to state a discrimination claim under the above-discussed *Twombly* "plausibility" standard. *Id.* at 1952. The Court held that a pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim under Rule 8 of the Federal Rules of Civil Procedure. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955).

In reviewing the complaint in *Iqbal*, the Court noted that the complaint did not contain any factual allegations claiming that Mueller or Ashcroft may have intentionally discriminated on the basis of race or religion. *Id.* at 1952 ("Accepting the truth of [the allegation of a adopting an impermissible policy], the complaint does not show, or even intimate, that petitioners purposefully housed detainees . . . due to their race, religion, or national origin."). The Court concluded that bare assertions regarding an invidious policy were not entitled to the assumption of truth because they amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955). The Court noted that the alleged facts, even if accepted as true, were more compatible on their face with lawful conduct. *Id.*

Here, unlike Iqbal's allegations, al-Kidd's complaint "plausibly suggest[s]" unlawful conduct, and does more than contain bare allegations of an impermissible policy. *Id.* at 1950. While the complaint similarly alleges that Ashcroft is the "principal architect" of the policy, the complaint in this case contains specific statements that

Ashcroft himself made regarding the post-September 11th use of the material witness statute. Ashcroft stated that enhanced tactics, such as the use of the material witness statute, "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street," and that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks." Other top DOJ officials candidly admitted that the material witness statute was viewed as an important "investigative tool" where they could obtain "evidence" about the witness. The complaint also contains reference to congressional testimony from FBI Director Mueller, stating that al-Kidd's arrest was one of the government's anti-terrorism successes—without any caveat that al-Kidd was arrested only as a witness. Comparatively, Iqbal's complaint contained no factual allegations detailing statements made by Mueller and Ashcroft regarding discrimination. The specific allegations in al-Kidd's complaint plausibly suggest something more than just bare allegations of improper purpose; they demonstrate that the Attorney General purposefully used the material witness statute to detain suspects whom he wished to investigate and detain preventatively, and that al-Kidd was subjected to this policy.

Further, unlike in *Twombly* and *Iqbal*, where the plaintiffs alleged a conspiracy or discriminatory practice in the most conclusory terms, al-Kidd does not rely *solely* on his assertion that Ashcroft ordered, encouraged, or permitted "policies and practices [whereby] individuals have also been impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been practicable to se-

cure their testimony voluntarily or by subpoena."[24] His complaint notes "one account" of material witness practices stating that "nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify." In a declaration filed in another proceeding well before al-Kidd's arrest, a DOJ official admitted that, of those detained as material witnesses, "it may turn out that these individuals have no information useful to the investigation." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 942 (D.C. Cir. 2003) (Tatel, J., dissenting) (quoting Declaration of James Reynolds, Chief of the Terrorism and Violent Crime Section, Criminal Division, Dep't of Justice).

Al-Kidd need not show that Ashcroft "actually instruct[ed] his subordinates to bypass the plain text of the statute," as Ashcroft contends. The complaint clearly alleges facts which might support liability on the basis of Ashcroft's knowing failure to act in the light of even unauthorized abuses, but also alleges facts which may support liability on the basis that Ashcroft purposely used the material witness statute to preventatively detain suspects and that al-Kidd was subjected to this pol-

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[24] Ashcroft contends that al-Kidd does not even go so far as to make such an assertion, and that he never explicitly says in his complaint that Ashcroft designed such a policy. This argument requires a hypertechnical reading of the complaint. The paragraph alleging outright violations of § 3144 begins with "*the* post-9/11 policies and practices," with the definite article. (Emphasis added). There is no reason from the text of the complaint to think that *those* "post-9/11 policies and practices" are anything other than "*The* post-9/11 material witness policies and practices *adopted and implemented by Defendant Ashcroft* "alleged fourteen paragraphs earlier in the complaint. (Emphasis added).

icy.[25] As discussed above, Ashcroft publically stated that the material witness statute was an important tool in "taking suspected terrorists off the street," and that "[a]ggressive detention of . . . material witnesses is vital to preventing, disrupting or delaying new attacks." Again, unlike in Iqbal, these are not bare allegations that the Attorney General "knew of" the policy. Here, the complaint contains allegations that plausibly suggest that Ashcroft purposely instructed his subordinates to bypass the plain reading of the statute.[26] "The plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). Here, the allegations recounted above clearly "nudge[ ]" al-Kidd's claim of illegality "across the line from conceivable to plausible." *Id.* at 1952 (citing *Twombly*, 550 U.S. at 570, 127 S. Ct. 1955).

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[25] The dissent contends that the "knowing failure to act" standard did not survive *Iqbal*. Dissent at 992 n.13. The dissent points to the fact that the Court held that Ashcroft could not be held liable for his "knowledge and acquiescence" of his subordinates' unconstitutional discrimination against Muslim men. 129 S. Ct. at 1948. We need not address whether the two standards are distinct, or whether the Court's comments relate solely to discrimination claims which have an intent element, because al-Kidd plausibly pleads "purpose" rather than just "knowledge" to impose liability on Ashcroft. *Id.* at 1949 ("[P]urpose rather than knowledge is required to impose *Bivens* liability . . . for an official charged with violations arising from his or her superintendent responsibilities.").

[26] The dissent believes that al-Kidd's complaint plausibly demonstrates only that Ashcroft directed his subordinates to use the statute "pretextually," not "unlawfully." Dissent at 993. As discussed above, the pretextual use of the material witness statute that results in a person being detained for criminal investigation without adequate probable cause runs afoul of the Fourth Amendment, and is thus unlawful.

Further, the complaint notes that the "abuses occurring under the material witness statute after September 11, 2001, were highly publicized in the media, congressional testimony and correspondence, and in various reports by governmental and non-governmental entities," which could have given Ashcroft sufficient notice to require affirmative acts to supervise and correct the actions of his subordinates. The complaint also avers that "the Justice Department has issued apologies to 10-12 individuals who were improperly arrested as material witnesses." Given that the government maintains that it does nothing wrong in the pretextual use of the material witness statute to investigate and preemptively detain, it is reasonable to infer that its apologies were for violations of the terms of the statute itself, of which the DOJ, and presumably its leader, were aware.[27] The complaint also contains extensive citations to the OIG Report, which discussed at length abuses and improprieties that occurred in a related context, involving investigatory detention of aliens. While the OIG Report was not released to the public until April 2003, it is reasonable to believe that Ashcroft, as Attorney General, would have been aware of its contents at a date preceding al-Kidd's arrest.

Our dissenting colleague contends that al-Kidd's pleadings merely establish that "some material witnesses were detained who did not testify or did not prove to have material information," perhaps because

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[27] To be sure, this is not a *necessary* inference: the apologies could have been for wrongs that do not rise to the level of a constitutional violation. But neither is it an *unreasonable* inference, and on a Rule 12(b)(6) motion, we draw all reasonable inferences in favor of the plaintiff.

defendants took plea deals or prosecutors acted hastily in conducting investigations. Dissent at 993. The dissent further contends that this does not amount to a *Franks* violation. *Franks*, 438 U.S. at 165, 98 S. Ct. 2674. As discussed above, al-Kidd pleads facts that go much further than merely showing that he was detained under the material witness statute and did not testify. The pleadings show that Ashcroft explicitly stated that enhanced techniques such as the use of the material witness statute "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street." Other top DOJ officials stated that the material witness statute was viewed as an important "investigative tool," and that al-Kidd's arrest was touted as one of the government's anti-terrorism successes, without any mention that he was being held as a material witness. We disagree with the dissent, and hold that al-Kidd has plead that Ashcroft's "concerted strategy" of misusing the material witness statute plausibly led to al-Kidd's detention.

Post-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints. As discussed in *Iqbal*, "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 1950. This concern applied with great force in the civil rights context, where "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Id.* at 1953 (citing *Siegert v. Gilley*, 500 U.S. 226, 236, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991)). Drawing on our "judicial experience and common sense," as the

Supreme Court urges us to do, we find that al-Kidd has met his burden of pleading a claim for relief that is plausible, and that his suit on the § 3144 claim should be allowed to proceed. *Id.* at 1950.

Were this case before us on summary judgment, and were the facts pled in the complaint the only ones in the record, our decision might well be different. In the district court, moving forward, al-Kidd will bear a significant burden to show that the Attorney General himself was personally involved in a policy or practice of alleged violations of § 3144. But *Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's burden. "Asking for plausible grounds to infer" the existence of a claim for relief "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to prove that claim. *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955. In this case, we hold that al-Kidd has pled "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 127 S. Ct. 1955.

5. Conditions of Confinement Claim

Lastly, al-Kidd complains that he was mistreated while confined as a material witness. Confinement of criminals is a punishment, and, within the limits of the Fifth and Eighth Amendments, it is supposed to be unpleasant. However, when, as here, the government is empowered to detain those who are not charged with crimes, it is under an obligation not to treat them like criminals. *See Youngberg v. Romeo*, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confine-

ment than criminals whose conditions of confinement are designed to punish."). Prior to 2003, at least two district courts had refused, on constitutional grounds, to house material witness detainees under the same conditions as those facing trial. *See United States v. Nai*, 949 F. Supp. 42, 46 (D. Mass. 1996) (expressing "concern[ ] that these five material witnesses are being treated as if they were charged with an offense" and ordering them "transferred to a minimum security, residential facility"); *In re Cochran*, 434 F. Supp. 1207, 1215 (D. Neb. 1977) (holding that "a witness who has had, at most, the misfortune of seeing a crime committed" must be held in "the least restrictive alternative that is reasonably calculated to assure the witness' presence for trial").

On this appeal, Ashcroft contests neither the substance of the right al-Kidd claims was violated in the Conditions of Confinement Claim, nor whether that right was "clearly established." Rather, as with the § 3144 Claim, he argues only that al-Kidd has failed to plead sufficient facts to tie Ashcroft, personally, to the alleged violation.

The unconstitutional conditions claim in this case is substantially similar to the claims in the Supreme Court's recent Iqbal decision. In *Iqbal*, the complaint alleged Ashcroft's liability for the conditions of confinement at the Metropolitan Detention Center in New York, where aliens arrested after 9/11 were held. 129 S. Ct. at 1944. Iqbal's complaint alleged that Ashcroft and FBI Director Robert Mueller approved of these highly restrictive detention policies in discussions that took place in the weeks after September 11, 2001. *Id.* at 1951. Similarly, al-Kidd claims here that Ashcroft promulgated and approved the unlawful policy which caused

al-Kidd "to be subjected to prolonged, excessive, punitive, harsh, unreasonable detention or post-release conditions." Contrary to the § 3144 claim, however, the complaint does not allege any specific facts—such as statements from Ashcroft or from high ranking officials in the DOJ—establishing that Ashcroft had personal involvement in setting the conditions of confinement.

As al-Kidd's complaint notes, media reports had observed the conditions detailed in the OIG Report to apply to Americans and legal aliens held as material witnesses. *See, e.g.*, Naftali Bendavid, *Material Witness Arrests Under Fire; Dozens Detained in War on Terror*, Chi. Trib., Dec. 24, 2001, at N1; Fainaru & Williams, supra, at A1; John Riley, *Held Without Charge: Material Witness Law Puts Detainees in Legal Limbo*, N.Y. Newsday, Sept. 18, 2002, at A6. Their conditions of confinement had also been noted by the courts. The district court in *Awadallah I*, writing in the spring of 2002, decried at length the state in which Mr. Awadallah had been held:

> Awadallah was treated as a high security federal prisoner. Having committed no crime—indeed, without any claim that there was probable cause to believe he had violated any law—Awadallah bore the full weight of a prison system designed to punish convicted criminals as well as incapacitate individuals arrested or indicted for criminal conduct.
>
> . . . In many ways, . . . the conditions of his confinement were more restrictive than that experienced by the general prison population.

202 F. Supp. 2d at 60; *see id.* at 60-61 & nn. 5-10 (describing Awadallah's allegations of mistreatment while

in custody). While it is possible that these reports were sufficient to put Ashcroft on notice by spring of 2003 that there was a systemic problem at the DOJ with respect to its treatment of material witnesses, the non-specific allegations in the complaint regarding Ashcroft's involvement fail to nudge the *possible* to the *plausible*, as required by *Twombly*.

Unlike the § 3144 Claim, which specifically avers facts which could sustain the inference that Ashcroft "set[ ] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury" regarding the illegal use of the material witness statute, *Kwai Fun Wong*, 373 F.3d at 966 (internal quotation marks omitted), the complaint's more conclusory allegations regarding Ashcroft's involvement in setting the harsh conditions of confinement (which are very similar to the allegations in *Iqbal*), are deficient under Rule 8. Accordingly, we reverse the district court on al-Kidd's Conditions of Confinement claim, and hold that al-Kidd has not alleged adequate facts to render plausible Ashcroft's personal involvement in setting the harsh conditions of his confinement, and has therefore failed to state a claim for which relief can be granted.

C. Personal Jurisdiction

Finally, Ashcroft contends that the district court erred in denying Ashcroft's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. As this is an interlocutory appeal, we will address the issue only to the extent it falls within our pendent appellate jurisdiction.

1. "Necessary to Provide Meaningful Review"

Ashcroft first alleges that the issue of personal jurisdiction is "necessary to provide meaningful review" of the district court's immunity rulings. It is true that personal jurisdiction was a necessary predicate to the district court's Rule 12(b)(6) ruling denying Ashcroft absolute and qualified immunity. But that could be said about *any* ruling following a decision on personal jurisdiction, so that alone cannot make our review of personal jurisdiction "necessary to provide meaningful review." *See, e.g., Poulos v. Caesars World, Inc.*, 379 F.3d 654, 671-72 (9th Cir. 2004) (holding that personal jurisdiction not "necessary to ensure meaningful review" of class certification); *see also Rux v. Republic of Sudan*, 461 F.3d 461, 475-76 (4th Cir. 2006) (same with respect to review of subject matter jurisdiction under FISA); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 204-05 (3d Cir. 2001) (same with respect to review of motion to compel arbitration).

The only cases that Ashcroft cites to suggest that personal jurisdiction is necessary to ensure meaningful review are cases involving interlocutory appeals of temporary injunctions. *Hendricks*, 408 F.3d at 1134-35; *In re Diet Drugs*, 282 F.3d 220, 230 n.5 (3d Cir. 2002). In entering a preliminary injunction, however, a district court has already necessarily found "at least a reasonable probability of ultimate success upon the question of jurisdiction." *Visual Scis., Inc. v. Integrated Comm., Inc.*, 660 F.2d 56, 59 (2d Cir. 1981) (citation and quotation marks omitted). To rule on the preliminary injunction is necessarily to make a judgment as to the question of jurisdiction. More importantly, the equitable remedy

of injunction, granted before trial, is itself an imposition on the defendant that goes well beyond merely being haled into court, and often effectively decides the issue in question. *See DuPont*, 269 F.3d at 205 n.9 (distinguishing a precedent involving a permanent injunction because "[i]t is well-settled that when a court grants an injunction, the underlying personal jurisdiction decision is immediately reviewable on appeal").

2. "Inextricably Intertwined"

Ashcroft next argues that the issue of personal jurisdiction is "inextricably intertwined" with the immunity issues. To be "inextricably intertwined," we "require that the two issues: (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003) (internal quotation marks and alterations omitted). The first criterion fails: unlike, for example, the temporary injunction, where success on the merits, including on the issue of personal jurisdiction, is an element of the issue being appealed, personal jurisdiction is not a subset of qualified immunity and we need not necessarily address the former to resolve the latter. *Cf. id.* ("We can decide the anti-SLAPP issue entirely independently of the question of personal jurisdiction, and different legal standards apply to each issue.").

The second criterion, however, is present—in part. To obtain specific personal jurisdiction over a defendant in a state, the defendant must either purposefully avail himself of the privilege of conducting activities in the state, or purposefully direct his activities toward the

state. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Purposeful direction, in turn, requires that the defendant have (1) committed an "intentional act," (2) "expressly aimed" at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Id.* at 805. The first element, an intentional act, is effectively decided by resolution of the "personal involvement" prong of the qualified immunity inquiry. Insofar as Ashcroft's objection to personal jurisdiction rests on the absence of an intentional act, we affirm the decision of the district court to exercise personal jurisdiction.

Insofar as Ashcroft's objection to personal jurisdiction rests on the fact that his acts were not "expressly aimed" at Idaho, or that he did not know that his acts were likely to cause harm in Idaho, we decline to rule on the issue. Far from being "inextricably intertwined," those issues are irrelevant to any element of absolute or qualified immunity. The federal courts of appeals are courts of limited jurisdiction, and Congress has not seen fit to give this court the general power to review district courts' exercise of personal jurisdiction before a final judgment. We therefore will not do so here.

CONCLUSION

Almost two and a half centuries ago, William Blackstone, considered by many to be the preeminent pre-Revolutionary War authority on the common law, wrote:

> To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by

> secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131-32 (1765). The Fourth Amendment was written and ratified, in part, to deny the government of our then-new nation such an engine of potential tyranny. And yet, if the facts alleged in al-Kidd's complaint are actually true, the government has recently exercised such a "dangerous engine of arbitrary government" against a significant number of its citizens, and given good reason for disfavored minorities (whoever they may be from time to time) to fear the application of such arbitrary power to them.

We are confident that, in light of the experience of the American colonists with the abuses of the British Crown, the Framers of our Constitution would have disapproved of the arrest, detention, and harsh confinement of a United States citizen as a "material witness" under the circumstances, and for the immediate purpose alleged, in al-Kidd's complaint. Sadly, however, even now, more than 217 years after the ratification of the Fourth Amendment to the Constitution, some confidently assert that the government has the power to arrest and detain or restrict American citizens for months on end, in sometimes primitive conditions, not because there is evidence that they have committed a crime, but merely because the government wishes to investigate them for possible wrongdoing, or to prevent them from having contact with others in the outside world. We find this to be repugnant to the Constitution, and a painful

reminder of some of the most ignominious chapters of our national history.

For the reasons indicated in this opinion, we **AFFIRM** in part and **REVERSE** in part the decision of the district court. Each party shall bear its own costs on appeal.

BEA, Circuit Judge, concurring in part and dissenting in part:

This case raises the question whether a person whom a prosecutor can *rightly* arrest under a statute becomes *wrongly* arrested if the prosecutor's purpose in arresting him had nothing to do with the statute. Put another way, can a prosecutor, empowered by law to arrest an individual for one declared purpose, be immune from suit when he arrests that person with another, secret purpose in mind?

Our natural reaction is, "Of course not!" Such a prosecutor is abusing the vast discretionary powers we have entrusted to him. He is not playing fair; he is playing "Gotcha!"

But under our law, that natural reaction would be wrong. For reasons of public policy, our law provides the prosecutor with official immunity—perhaps not immunity from being fired, impeached, or hounded from public life, but immunity nonetheless—from lawsuits for money damages based on the acts he undertakes on behalf of the public.

The Supreme Court has developed this law by repeatedly instructing us not to inquire into the personal, subjective intentions of a government official when determining whether the official is protected by official immunity. Reading the minds of government officials is

notoriously expensive, uncertain, and fraught with error. The very purpose of official immunity is to shield the purses of government officials from the high costs of civil damages lawsuits. If official immunity were to depend upon proof of the officials' good intentions, the value of that immunity would be lost.

Yet today, the majority permits plaintiff Abdullah al-Kidd to seek redress from the wallet of a federal cabinet-level official for injuries al-Kidd alleges he suffered when he was detained—pursuant to a warrant signed and issued by a neutral federal magistrate judge—as a material witness in the government's prosecution of an indicted terrorist suspect.

The sole reason the majority provides for stripping former Attorney General John Ashcroft of his official immunity is that, although he and his subordinates had sufficient evidence to arrest al-Kidd as a material witness in the prosecution of a suspected terrorist under the applicable statute, they acted with a forbidden state of mind: they *really* arrested him not to testify against the indicted terror suspect, but to investigate al-Kidd himself.

Because I do not believe this holding comports with the Supreme Court's instructions regarding official immunity and Fourth Amendment law, I must respectfully dissent.

I also dissent from the majority's resolution of al-Kidd's claim that Ashcroft is personally liable for the inclusion of claimed material misrepresentations and omissions in the affidavit supporting the material witness warrant on which al-Kidd was detained. Al-Kidd's complaint does not state facts sufficient plausibly to show Ashcroft was personally responsible for the

claimed falsities. *See Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

I. Background

After 9/11, in connection with an investigation into terrorist activities in Idaho, federal agents interviewed al-Kidd on several occasions. In February 2003, a grand jury returned an indictment against Sami Omar Al-Hussayen, a suspect in that investigation. During the course of the investigation, FBI agents learned, and later affied, that al-Kidd had received "in excess" of $20,000 from Al-Hussayen, had met with Al-Hussayen's associates after al-Kidd's trip to Yemen, and had contacts with the Islamic Assembly of North America ("IANA") (the suspected Jihadist organization for which Al-Hussayen worked).[1] One month later, al-Kidd purchased a plane ticket to Saudi Arabia. Apprehensive, they said, that al-Kidd would abscond to Saudi Arabia with information critical to the prosecution of al Hussayen, never to return, the federal agents sought a warrant for his arrest. The agents appeared before a magistrate, swore they had good cause to believe al-Kidd both had information material to Al-Hussayen's prosecution and was on the run, and then arrested al-Kidd at Dulles International Airport as he was about to board a plane

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[1] As the majority states, the Al-Hussayen indictment alleged that one of the IANA's purposes was "indoctrination, recruitment of members, and the instigation of acts of violence and terrorism." The Al-Hussayen indictment also alleged Al-Hussayen himself was the sole registrant of another website, www.alasr.ws, which was affiliated with the IANA's website through a third website belonging to the IANA. The www.alasr.ws website published an article in June 2001 entitled "Provision of Suicide Operations," which advocated suicide bombings and "bringing down" aircraft.

to Saudi Arabia. The government held al-Kidd for fourteen days and released him only when al-Kidd surrendered his passport and agreed to certain conditions of release. In the event, al-Kidd was never called to testify at al-Hussayen's trial.

Al-Kidd filed this action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), in the United States District Court for the District of Idaho. Al-Kidd named as defendants not only the officers who prepared the material witness warrant, but former Attorney General Ashcroft, FBI Director Robert Mueller, and former Secretary of the Department of Homeland Security Michael Chertoff, as well as the wardens of the prisons in which he was detained. In his complaint, al-Kidd raises three very distinct claims. First, al-Kidd alleges that the conditions under which he was confined were unconstitutionally harsh. Second, al-Kidd alleges his detention on a material witness warrant was illegal because it was based on pure pretext; the government wanted to detain al-Kidd not to secure his testimony at the Al-Hussayen trial but really to keep al-Kidd himself off the streets and to investigate him. Al-Kidd contends that even if the warrant on which he was detained was objectively valid, the preparing officers' subjective intention to use the warrant to accomplish an illicit goal rendered the officers' actions unconstitutional. Third, al-Kidd contends the warrant was not only illegal because it was pretextual, it was also invalid because it was based on an affidavit containing material misrepresentations and omissions: Al-Kidd had no information useful to the investigation, he was not a flight risk, and the government knew it but concealed those facts from the magistrate.

Ashcroft contends each of these claims is barred, either because al-Kidd has not pleaded facts sufficient to establish Ashcroft's personal involvement; because Ashcroft enjoys absolute or qualified immunity against al-Kidd's claims; or, because the district court lacked personal jurisdiction over Ashcroft.

The majority concludes that al-Kidd has not adequately pleaded Ashcroft's personal involvement in the decision to subject him to unconstitutionally harsh conditions of confinement. I agree, and therefore I join in Part B.5 of the majority opinion ("The Conditions of Confinement Claim").

As to al-Kidd's second and third claims, however, the majority affirms the district court's order denying Ashcroft's motion to dismiss.

I disagree. As to al-Kidd's claim prosecutors used the material witness statute as a pretext to pursue other, investigatory or crime prevention agendas, the answer is simply that such pretext does not invalidate the arrest warrant; I would hold Ashcroft is shielded by qualified immunity. In light of the considerable authority recognizing that the pretextual use of an objectively justifiable search or seizure does not violate the Fourth Amendment, it follows the federal agents did not violate al-Kidd's constitutional rights. But if I'm wrong, in any case al-Kidd's right not to be arrested on an objectively valid, but pretextual arrest warrant was not "clearly established" in March 2003, when al-Kidd was detained, and qualified immunity therefore shields Ashcroft from al-Kidd's claims. *See Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). I therefore dissent from part B.3 of the majority opinion ("The Fourth Amendment Claim").

As to al-Kidd's claim that his detention violated the Fourth Amendment and the terms of the material witness statute because the supporting warrant application contained material misrepresentations and omissions, we cannot reach the merits of his claim, for—as with his claim that Ashcroft is liable for the claimed wretched conditions of al-Kidd's confinement, as to which all of us agree his claim fails— al-Kidd has failed to allege facts sufficient to establish Ashcroft's personal liability for such conduct. *See Ashcroft v. Iqbal*, 556 U.S. —, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Therefore I dissent from part B.4 of the majority opinion.

Lastly, I disagree, in part, with the majority's treatment of Ashcroft's claim of absolute immunity. I agree that Ashcroft lacks absolute prosecutorial immunity for his acts or omissions in supervising the officers who acted as complaining witnesses in support of a material witness warrant application. When officials—whether prosecutors or police officers-act as mere witnesses in support of a warrant application, absolute immunity does not shield their actions. Equally, Ashcroft would lack absolute immunity for his acts or omissions in supervising officers who obtain a material witness warrant to secure the presence of a witness before an investigatory grand jury, rather than a criminal trial. However, I disagree that Ashcroft does not enjoy absolute immunity for his supervision of prosecutors who decide to seek a material witness warrant to secure the presence of a witness at a criminal trial, regardless of any claimed improper motive.[2]

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[2] I express no opinion as to parts B.1 ("Qualified Immunity Generally") and B.2 ("Qualified Immunity for Supervisors"). I also express no opinion as to part C ("Personal Jurisdiction"). Because I conclude

I address each of these issues in turn.

II. Qualified Immunity

I would hold that Ashcroft enjoys qualified immunity from al-Kidd's claim that the material witness warrant on which he was detained was merely a pretext to accomplish other law enforcement objectives. To be clear, al-Kidd's *pretext* claim is not that the material witness warrant on which he was detained was invalid on its face or because it was based on an affidavit containing material misrepresentations or omissions.[3] Rather, in his *pretext* claim, al-Kidd contends that *even if* the material witness warrant on which he was detained was objectively valid and supported by probable cause, the prosecutor's subjective intention to use the material witness warrant to accomplish other, law-enforcement objectives renders the government's conduct unconstitutional. Because al-Kidd had no constitutional right to be free from such conduct-and certainly had no *clearly established* constitutional right-I dissent from the majority's conclusion that Ashcroft lacks qualified immunity.

Al-Kidd bases his claims of liberty from arrest on the Fourth Amendment. The Supreme Court has repeatedly stated that under the Fourth Amendment, an officer's subjective intentions are irrelevant so long as the

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al-Kidd cannot proceed on his claims against Ashcroft, I would not reach the difficult question whether this court has pendent appellate jurisdiction over Ashcroft's appeal of the district court's order denying his motion to dismiss al-Kidd's claims against him for lack of personal jurisdiction. If it is not necessary to decide an issue, it is necessary for a common-law court not to decide it.

[3] Al-Kidd later makes this claim separate and distinct from his pretext claim. It is addressed infra, parts III and IV.

officer's conduct is objectively justified. *See, e.g., Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." (internal citations and quotation marks omitted));[4] *Scott v. United States*, 436 U.S. 128, 136-37, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978) ("Subjective intent alone, the Government contends, does not make otherwise lawful conduct illegal or unconstitutional. We think the Government's position, which also served as the basis for decision in the Court of Appeals, embodies the proper approach for evaluating compliance with the minimization requirement [relating to wiretaps].");[5]

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[4] In *Macon*, an undercover police officer purchased pornographic materials from a bookstore. The officer left the bookstore, consulted with fellow officers, and, upon concluding the book was pornographic, returned to the bookstore and arrested the storekeeper and seized the marked bill the officer used to purchase the book. The Supreme Court held that the purchase, in a voluntary transaction, of wares by an undercover officer is not a search within the meaning of the Fourth Amendment. *Id.* at 469, 105 S. Ct. 2778. The storekeeper contended the officer's subjective intention to retrieve the marked $50 bill transformed the sale into a search. *Id.* at 469-70, 105 S. Ct. 2778. The Supreme Court disagreed and held that because the transaction, objectively viewed, was a sale in the ordinary course of business, the sale did not constitute a search. *Id.*

[5] In *Scott*, officers obtained a warrant to intercept the phone calls of a suspected drug dealer. *Id.* at 131, 98 S. Ct. 1717. The warrant required the officers to minimize their interception of non-narcotics-related phone calls. *Id.* The wiretap resulted in the arrest and indictment of more than twenty individuals. *Id.* Scott moved to suppress the intercepted phone calls on the ground officers had failed to comply with the minimization requirement. *Id.* at 132, 98 S. Ct. 1717. The district court

United States v. Robinson, 414 U.S. 218, 236, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (holding that an officer's objectively lawful search incident to arrest was lawful though officer lacked the subjective intention-fear that the arrestee was armed-that normally attaches to such searches).

Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), cited by the majority, is but one example of the general rule that pretextual searches and seizures do not violate the Fourth Amendment. In *Whren*, the Supreme Court held the stop of a vehicle for a minor traffic violation did not violate the Fourth Amendment even though the officer was using the stop "as pretext[ ] for pursuing other investigatory agendas." *Id.* at 811, 116 S. Ct. 1769. The Court stated:

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granted the motion to suppress, concluding that even if every intercepted phone call had been narcotics-related, the officers' failure to make any good faith efforts to comply with the minimization requirement rendered the wiretap illegal. *Id.* at 132-34, 98 S. Ct. 1717. The court of appeals reversed because the court could not conclude that reasonable efforts at minimization would have prevented the interception of any of the phone calls. *Id.* at 134, 98 S. Ct. 1717. After a jury trial on remand, Scott was convicted. The court of appeals affirmed, *id.* at 135, 98 S. Ct. 1717, and the Supreme Court affirmed the court of appeals. *Id.* at 137-38, 98 S. Ct. 1717. The Supreme Court rejected Scott's contention that the officers' " failure to make good-faith efforts to comply with the minimization requirement is itself a violation of [the wiretap statute]." *Id.* at 135, 98 S. Ct. 1717. The Court explained that the "existence vel non of such a violation turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," not on the officers's subjective intentions. *Id.* at 136, 98 S. Ct. 1717.

> We [have] flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. . . . [S]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional. We described *Robinson* [414 U.S. at 236, 94 S. Ct. 467] as having established that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."

Id. at 812-13, 116 S. Ct. 1769 (internal citations omitted). It is really quite simple. If you are engaged in conduct that justifies your detention, you must put up with that detention, even if the officer who detained you did so out of some secret-and constitutionally insufficient-motive.

There is good reason to eschew inquiry into the subjective motivations of individual officers. First, such an approach provides "arbitrarily variable" protection to individual rights. *Devenpeck v. Alford*, 543 U.S. 146, 154, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004). If the subjective intentions of the arresting officers are the touchstone of constitutional analysis, courts may reach divergent results about searches and seizures that are utterly indistinguishable in the eyes of the person whose rights are at stake. *See id.* at 154, 125 S. Ct. 588.[6] Second, the

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[6] For example, imagine two drug smugglers speeding, illegally, down the highway who are stopped by police. Each smuggler is identical in every respect, save one: one is stopped by an officer totally ignorant of the fact that the car is carrying drugs, the other by an officer who suspects the driver's involvement in a drug ring. Seen from the perspective of the two drivers, each should face an identical penalty. Each broke the law and made himself subject to being stopped. But if the

inquiry into subjective intentions is impossibly difficult, expensive, and prone to error. As the Supreme Court explained in *Harlow v. Fitzgerald*,

> [t]here are special costs to subjective inquiries of this kind. . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. 800, 816-817, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (footnotes and internal quotation marks omitted). *Whren*, along with *Harlow*, *Robinson*, *Scott*, and *Macon*, makes clear that al-Kidd's arrest on an objectively valid warrant supported by probable cause violated none of al-Kidd's constitutional rights. At a minimum, these cases would have given a reasonable officer good reason to believe that al-Kidd's arrest was constitutionally permissible.

The majority's efforts to distinguish *Whren* are unpersuasive. The majority contends that *Whren* and like cases are inapplicable whenever the government acts without probable cause to believe that the *subject* of the arrest is guilty of some criminal wrongdoing. Maj. Op. at 966-67. To reach this result, the majority imports the "programmatic purpose" test ordinarily reserved for administrative or "special needs" search cases. The pro-

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suspicious officer's subjective intentions invalidate his stop, then one driver escapes punishment while the other does not. As Devenpeck explained, an individual's right to be free of arrest should not depend upon such chance factors as which police officer arrested him. *Id.* at 155-56, 125 S. Ct. 588.

grammatic purpose test, of course, tests the constitutional validity of *warrantless* searches and seizures, such as drunk driving roadblocks, by requiring the government to prove its program serves governmental interests other than the routine collection of evidence for criminal prosecution. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 78, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000). The special needs cases are the sole exception to the general principle that, in testing compliance with the Fourth Amendment, courts are limited to an examination of the objective circumstances which justify the search or seizure, and may not inquire into official purpose. Whren, 517 U.S. at 812, 116 S. Ct. 1769 ("Not only have we *never* held, outside the context of inventory search or administrative inspection[,] . . . that an officer's motive invalidates objectively justifiable behavior[,] . . . we have repeatedly held and asserted the contrary."). The programmatic purpose test applies here, the majority says, because in *Edmonds*, the Supreme Court said that *Whren* did not apply whenever the government conducted a search or seizure without "probable cause," and because "probable cause" means only probable cause to believe the subject of the arrest committed some wrongdoing. The cases the majority cites offer no support whatsoever for the majority's approach.

First, the special needs cases have no bearing on the inquiry into al-Kidd's arrest for the simple reason that al-Kidd was arrested pursuant to a warrant issued by a neutral magistrate. The "programmatic purpose" inquiry is necessary to test the validity of a special needs search precisely because such searches occur without the procedural protections of the warrant requirement

and the magisterial supervision it entails. As the Supreme Court explained in *New York v. Burger*, a statute authorizing a warrantless administrative or special needs search must provide

> a constitutionally adequate *substitute* for a *warrant*. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

482 U.S. 691, 710-11, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) (emphasis added) (quotations omitted). Material witness warrants, though not based on individualized suspicion of wrongdoing are, of course, warrants: they are based on an individualized determination that the subject of the warrant is in possession of information material in a criminal proceeding and is likely to flee; they are approved by a neutral magistrate; they are subject to continuing oversight; and they issue only upon a showing of probable cause. *Bacon v. United States*, 449 F.2d 933, 942 (9th Cir. 1971); 18 U.S.C. §§ 3144; Fed. R. Civ. P. 46. The "special needs" cases bear little resemblance to the highly supervised process of obtaining a material witness warrant. Given the protections in § 3144, there is simply no need to inquire into the government's "programmatic purpose," and no case has ever so required.

Second, the majority's "traditional" definition of "probable cause," which limits probable cause to mean only probable cause to believe that the arrestee is guilty of wrongdoing, Maj. Op. at 966-67, reflects a fundamental misunderstanding of the Fourth Amendment. The

validity of a police action under the Fourth Amendment turns not on the guilt or innocence of the arrestee, but on whether the government's reasons for arresting the individual are weighty enough, and probably factually likely enough, to justify the intrusion into some individual's rights.[7] *See United States v. Knights*, 534 U.S. 112, 118-19, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotation marks omitted). The "probable cause" requirement assures that there is sufficient evidence to believe that the facts that justify the issuance of the warrant exist—that there is a sufficient "probability" the government will find what it is looking for when it intrudes. Cir. 2 at 121, 122 S. Ct. 587.

Until today, no case has suggested that the only governmental interest of sufficient weight to justify an arrest is a reasonable belief that the arrestee has committed a crime. Most importantly, the Supreme Court has stated that the government's interest in the integrity of the justice system is important enough to justify the arrest of a wholly innocent person to secure that witness's appearance at trial. *See Stein v. New York*, 346

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[7] This is not to deny the existence of what the majority terms the "substantive component" of the Fourth Amendment. Maj. Op. at 967. Instead, this merely demonstrates that this "substantive component" of the Fourth Amendment can be satisfied by *any* governmental interest—whether to detain a wrongdoer or to provide for the production of evidence against a wrongdoer—weighty enough to justify an intrusion into individual rights.

U.S. 156, 184, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) ("The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."), rev'd on other grounds by *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 616-17, 49 S. Ct. 452, 73 L. Ed. 867 (1929) ("The constitutionality of [the material witness statute] apparently has never been doubted.").[8] Our own jurisprudence, too, has recognized that "probable cause" for an arrest may exist even in the absence of a reasonable belief that the arrestee has committed wrongdoing. For example, police officers may arrest individuals innocent of any crime if the officer has reason to believe that the individual is a danger to himself. *Maag v. Wessler*, 960 F.2d 773, 776 (9th Cir. 1992). To be sure, in the great run of arrest cases, the relevant inquiry will be whether officers had probable cause to believe the subject committed wrong-

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[8] The majority needlessly casts doubt upon the validity of § 3144. Even if the Supreme Court's statements on the issue are dicta, they have considerable weight here. In part because we cannot "lightly" disregard any Supreme Court precedent, *Siskiyou Regional Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 549 n.1 (9th Cir. 2009), and in part because this court has already positively commented on these statements, *see Bacon*, 449 F.2d at 941. In any event, al-Kidd does not contend that a showing of probable cause to believe (1) that a witness has information that is material in any criminal proceeding and (2) the witness's appearance cannot be secured by subpoena is insufficient to provide objective justification for an arrest. *See* Appellee's Brief at 43. Notably, in neither *Barry* nor *Stein* was there any suggestion that the validity of a material witness warrant would either turn on the subjective intentions of the officers or depend upon a demonstration that there was probable cause to believe the subject of the arrest was guilty of wrongdoing.

doing. But none of the cases the majority claims defines probable cause had occasion to consider whether such belief was the *only* belief that could justify an arrest.

In the closely analogous context of searches, it is clear that, consistent with the Fourth Amendment, government agents, with a warrant supported by probable cause, may intrude to search upon the premises even of individuals who are suspected of no wrongdoing whatsoever. In *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978), government agents obtained a warrant to search the offices of the Stanford Daily for photographs that might reveal the identity of protesters who had assaulted policemen during a campus disturbance. *Id.* at 548, 98 S. Ct. 1970. There was no claim that Stanford Daily photographers or employees were themselves the assailants. *See id.* The Supreme Court held the warrant was valid, despite the fact that members of the Stanford Daily were not suspected of having done anything wrong: "[V]alid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." *Id.* at 554, 98 S. Ct. 1970 (emphasis added); *see also Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981) (holding that an arrest warrant does not authorize officers to enter the homes of third parties to execute the warrant, absent exigent circumstances, without first obtaining a warrant to enter the premises).[9]

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[9] *Steagald* also demonstrates that the majority's invocation of the Wilkes cases is inapposite. The evil associated with the general writs and writs of assistance used in the colonial period was that these warrants "provided no judicial check on the determination of the executing

Though *Zurcher* involved a search, rather than a seizure, its rationale is applicable here and squarely rejects the majority's contention that the probable cause requirement of the Fourth Amendment may be satisfied only by suspicion of wrongdoing by the subject of the intrusion. As the Supreme Court explained, the property owner's guilt or innocence is simply irrelevant to the constitutional analysis: "it is apparent that whether the third-party occupant is suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same. . . . " *Zurcher*, 436 U.S. at 560, 98 S. Ct. 1970. And one who knows he has evidence relevant to a criminal prosecution but refuses to hand such evidence over to prosecutors "is sufficiently culpable to justify the issuance of a search warrant." *Id.* The same holds true for a material witness. The government's interest in recovery of evidence from a material witness is the same whether the witness is guilty or innocent of wrongdoing. The need to obtain evidence from that witness and secure his appearance at trial is of sufficient weight to justify an arrest. *See Stein*, 346 U.S. at 184, 73 S. Ct. 1077; *Barry*, 279 U.S. at 616-17, 49 S. Ct. 452.

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officials that the evidence available justified an intrusion into a particular home." *Id.* at 220, 101 S. Ct. 1642. § 3144 provides precisely the check on official discretion that was absent during the colonial period: supervision by a neutral magistrate. It was not Lord Halifax or even Attorney General Ashcroft who signed the material witness warrant that authorized al-Kidd's arrest. It was a federal magistrate judge.

In short, our cases, and those of the Supreme Court, have routinely recognized that "probable cause," within the meaning of the Fourth Amendment, may be satisfied by proof of something other than wrongdoing by the subject of the search or seizure.

Of course, taken to its logical conclusion, the majority opinion renders the material witness statute entirely superfluous. To arrest and confine an individual pursuant to the material witness statute, the government must establish "probable cause." *Bacon*, 449 F.2d at 941-43. If "probable cause" exists only when the subject of an arrest is suspected of a crime, then a material witness can be arrested as a suspect, and the material witness statute adds nothing.[10] This result is risible.[11]

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[10] The majority contends it does not render the material witness statute superfluous by arguing that if the statute is "genuinely" used to secure the testimony of a witness at trial, a showing of probable cause that the arrestee has engaged in wrongdoing is not required, and that only when the statute is being used as a pretext for criminal investigation is a showing of probable cause "*including individualized suspicion of criminal wrongdoing*" required. Maj. Op. at 988-89. (emphasis in original). This argument suggests that the probable cause standard for issuing a warrant can vary depending on the subjective intention of the officer seeking the warrant. Not only is there no support in the case law for such a position, it is directly contradicted by the holding in *Whren*. 517 U.S. at 811, 116 S. Ct. 1769. Furthermore, the majority seems implicitly to recognize that probable cause can encompass more than the likelihood that the arrestee has engaged in criminal wrongdoing. Otherwise the majority's argument reads the necessity of showing probable cause right out of the issuance of a material witness warrant when the prosecutor "really" wants to obtain evidence for trial, and thus runs directly against the express language of the Fourth Amendment. If the prosecutor wants a material witness warrant because he "really" wants to secure that person's testimony at trial, according to the majority, he need not show probable cause that the potential witness engaged in wrongdoing. However, unless the majority also recog-

Once the government demonstrated to a neutral magistrate that it had probable cause to believe al-Kidd had information material to a criminal proceeding and was likely to run off to Saudi Arabia, the *Whren* rule applied with full force, and nothing in *Edmond* or any case the majority cites suggests otherwise.

Third, the Supreme Court's decision in *United States v. Villamonte-Marquez*, 462 U.S. 579, 103 S. Ct. 2573, 77 L. Ed. 2d 22 (1983), which the majority inadequately addresses, casts even greater doubt on the correctness of the majority's decision. In that case, the Supreme Court authorized precisely what the majority says can never be permissible: a pretextual seizure in the absence of reasonable suspicion or probable cause. In that case, customs agents, acting on a tip about marijuana smuggling, detained a sailboat pursuant to 19 U.S.C. § 1581(a). That statute authorized customs agents to "board any vessel at any time and at any place in the United States to examine the vessel's manifest and other documents." *Id.* at 580, 103 S. Ct. 2573. While executing the document inspection, officers smelled marijuana. They found 5800 pounds of the stuff on board the ship and arrested the crew. *Id.* at 583, 103 S. Ct. 2573. The crew members were convicted for conspiracy to import marijuana. *Id.* On appeal, the Fifth Circuit reversed the convictions, holding the detention was invalid—the

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nizes that probable cause in this context means showing a likelihood that the arrestee has material testimony, and that it will become impracticable to secure his presence by subpoena as required by 18 U.S.C. § 3144, then the majority would be sanctioning the issuance of an arrest warrant without any probable cause whatsoever.

[11] And we have been wasting much printer's ink on material witness statutes which have existed at least since the late Eighteenth Century. *See Bacon*, 449 F.2d at 938-41.

officers lacked constitutionally sufficient individualized suspicion of wrongdoing—and the fruits of the detention were barred from evidence. *Id.* at 583-84, 103 S. Ct. 2573. The Supreme Court reversed the decision of the Fifth Circuit and upheld the convictions. Cir. 2 at 584, 103 S. Ct. 2573. The Court held that the special difficulties associated with enforcement of maritime registration laws justified suspicionless stops and inspections on waterways. *Id.* at 591, 103 S. Ct. 2573. The Court emphasized the long historical pedigree of § 1581(a) as proof that the Founders did not believe such intrusions violated the Fourth Amendment. Cir. 2 at 584-85, 103 S. Ct. 2573. In a footnote, the Court rejected the crew members' contention that the customs officers' subjective intentions rendered the stop and inspection pretextual and thus unlawful:

> Respondents, however, contend . . . that because the Customs officers were accompanied by a Louisiana State Policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marijuana, they may not rely on the statute authorizing boarding or inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in Scott . . . and we again reject it.

Id. at 584 n. 3, 103 S. Ct. 2573.

Like the statute at issue in *Villamonte-Marquez*, some version of the material witness statute has been on the books since the late-1700s. *See Bacon*, 449 F.2d at 938-41. Since then, courts have approved the constitutionality of the power to detain material witnesses. *See supra* note 11. As the Supreme Court explained, the " 'duty to disclose knowledge of crime . . . is so vital that

one known to be innocent may be detained, in the absence of bail, as a material witness.'" *Bacon*, 449 F.2d at 939 (quoting *Stein*, 346 U.S. at 184, 73 S. Ct. 1077).

Finally, *Villamonte-Marquez* also underlines the point that, even assuming we must consider the "programmatic purpose" behind al-Kidd's detention, the relevant inquiry is not into the motivations of individual officers who obtained and executed the particular warrant on which al-Kidd was detained, but into the "programmatic purpose" that provides the constitutional justification for the material witness statute. *See Edmond*, 531 U.S. at 47, 121 S. Ct. 447 ("[W]e caution that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene."). The justification for the use of material witness warrants is the need to assure the proper functioning of the judicial system; this interest is divorced from the government's general interest in crime control and is sufficient, al-Kidd concedes, to justify an arrest. Because this governmental interest justifies this intrusion into al-Kidd's liberty, and because the intrusion is subject to a warrant requirement, inquiry into the minds of individual officers is neither necessary nor desirable. *See Villamonte-Marquez*, 462 U.S. at 584 n.3, 103 S. Ct. 2573.

But even if al-Kidd's arrest on a pretextual material witness warrant violated his Fourth Amendment constitutional right not to be subjected to an unreasonable seizure, any such right was certainly not "clearly established" in March 2003. As the majority notes, for a right to be clearly established there need not be a case on point, but the violation must be "apparent" to a reason-

able official. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). In March 2003, when al-Kidd was arrested on a material witness warrant, it would hardly have been "apparent" to a reasonable official that using a valid material witness warrant as a pretext to accomplish other law-enforcement objectives was constitutionally impermissible, especially if the official had read *Whren*, *Robinson*, *Scott*, or *Macon*.

No court had ever questioned the constitutional validity of the material witness statute. No court had ever held that the "programmatic purpose" test applied to searches or seizures conducted pursuant to a warrant. No court had held that "probable cause" in the Fourth Amendment meant only probable cause to believe the subject of the search or seizure had committed criminal wrongdoing. Every pronouncement by the Supreme Court would have suggested that the pretextual use of a valid warrant was perfectly legal.

Eight months after al-Kidd's arrest, for the very first time, and in dicta no less, a court of appeals stated that the pretextual use of material witness warrants was "improper." *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) ("The district court noted (and we agree) that it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established.").[12] Prior to that, only one

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[12] Obviously, we are not bound by the decision of another circuit, especially if that part of the decision was dicta. In any event, unlike in our circuit, dicta in the Second Circuit is not binding authority even in the Second Circuit. *Jimenez v. Walker*, 458 F.3d 130, 142-43 (2d Cir. 2006). It also remains to be said: what did *Awadallah* mean by the use of "improper"? It could mean anything from pecksniffian distaste to

district court had said anything similar. *See United States v. Awadallah*, 202 F. Supp. 2d 55, 78 (S.D. N.Y. 2002), *rev'd on other grounds by Awadallah*, 349 F.3d 42. In light of the substantial contrary authority spelling out that an officer's subjective intentions do not invalidate an objectively valid warrant, this solitary district court decision was hardly sufficient to make it "apparent" to a reasonable official that the pretextual use of material witness warrants was unconstitutional. *See Sorrels v. McKee*, 290 F.3d 965, 970-71 (9th Cir. 2002) (holding that two district court decisions were insufficient to make a right "clearly established").

The Supreme Court has flatly stated that pretextual searches and seizures conducted pursuant to a warrant issued upon objectively reasonable probable cause do not violate the Fourth Amendment. Nothing in the majority opinion provides any justification for departing from this rule. Attorney General Ashcroft is entitled to qualified immunity.

III. Al-Kidd's complaint fails to allege Ashcroft instructed or knowingly allowed FBI agents to present false affidavits to the magistrate judge who issued the material witness warrant.

Al-Kidd's remaining claim is that Ashcroft is personally liable for al-Kidd's detention on a material witness warrant obtained on the basis of intentional or reckless material misrepresentations or omissions. Of course,

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sanctionable conduct by an officer of the courts, and from harmless error to grounds for reversal. It seems not even a thin reed upon which to base an assertion it proclaimed to the nation's constabulary a "clearly established" constitutional right.

this claim raises totally different constitutional issues than that based on pretext.

It is not disputed that al-Kidd has a clearly established constitutional right not to be detained on a warrant based on an agent's deliberate or reckless misrepresentations or omissions. *See Franks v. Delaware*, 438 U.S. 154, 164-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). But it was Ashcroft's subordinates, not Ashcroft himself, who obtained the material witness warrant on which al-Kidd was detained. Al-Kidd makes only conclusory allegations Ashcroft ordered his subordinates to arrest individuals on invalid warrants. But such conclusory allegations do not suffice. Before we reach the merits of al-Kidd's claims the affidavits were false, we must determine if he alleges *facts* sufficient to establish Ashcroft's personal liability. I disagree with the majority's conclusion that Ashcroft may be held liable for what his subordinates may have done here, because al-Kidd's complaint simply does not state facts that plausibly establish Ashcroft, "through [his] own actions," violated al-Kidd's rights under the material witness warrant statute or the Constitution. *Iqbal*, 129 S. Ct. at 1948.

The majority concludes Ashcroft may be held liable in al-Kidd's Bivens action for his "knowing failure to act" in the light of evidence of unauthorized abuses, and that al-Kidd's pleadings are sufficient to establish plausibly that Ashcroft had knowledge of "abuses" occurring

under § 3144 and failed to act to correct these abuses.[13] Maj. Op. at 975-76.

What "abuses"? The abuses to which al-Kidd refers in his allegations are not lies or omissions included in supporting affidavits, but pretextual arrests. But, as shown above (in Part II, "Qualified Immunity"), such "abuses" violate neither the statute nor the Constitution. And to allege Ashcroft's knowledge of these "abuses" does not allege facts that plausibly establish Ashcroft knew of or encouraged his subordinates recklessly to disregard the truth in the preparation of supporting affidavits. *See Franks*, 438 U.S. at 164-72, 98 S. Ct. 2674.

In reviewing al-Kidd's allegations regarding Ashcroft's personal involvement, ask yourself after each one, "Did al-Kidd here allege facts that plausibly establish Ashcroft ordered or knowingly tolerated agents swearing to false facts in their affidavits?":

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[13] Ashcroft cannot be held liable for the acts of his subordinates on a theory of respondeat superior or vicarious liability. *Id.* at 1948. It is doubtful that the majority's "knowing failure to act" standard survived *Iqbal*. There, the Court held that Ashcroft could not be held liable for his "knowledge and acquiescence" in his subordinates' alleged unconstitutional discrimination against Muslim men after 9/11. *Id.* at 1949. The Court explained: "[P]urpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." *Id.* at 1949. Here, because al-Kidd has not alleged that Ashcroft knew his subordinates were making deliberate or reckless material misrepresentations or omissions in material witness applications, much less that it was Ashcroft's purpose they do so, al-Kidd's allegations clearly fail *Iqbal*'s requirements.

- Ashcroft stated publicly that "[a]ggressive detention of lawbreakers and material witness warrants is vital to preventing, disrupting, or delaying new attacks."
- A Justice Department policy memo stated that federal law enforcement personnel were to use "every available law enforcement tool" to arrest terror "suspects." This included the use of "aggressive arrest and detention tactics."
- One Justice Department official admitted that the material witness policy amounted to "preventive detention."
- Other Justice Department officials admitted that material witness warrants were an important "investigative tool" whereby they could obtain "evidence" about the witness. Similarly, FBI Director Mueller stated that several "suspects" had been detained on material witness warrants.
- One news report stated that 50% of those detained on material witness warrants were never called to testify. One Justice Department official admitted that this statistic proved that material witness warrants were a "ruse" to detain suspects.
- "Abuses" occurring under the statute were "highly publicized" in the media.
- The department apologized to several individuals arrested on material witness warrants.

In each case, the answer to the question put is a flat "no." These allegations certainly do suggest Ashcroft

encouraged prosecutors to use valid material witness warrants as a means to accomplish other law- enforcement objectives. But none of the allegations contain facts that plausibly establish Ashcroft's knowledge that his subordinates were obtaining material witness warrants on the basis of deliberately or recklessly false evidence or on facially invalid warrants. Some of al-Kidd's allegations suggest precisely the opposite—that Justice Department officials were careful to ensure they had probable cause to believe that the targeted witness had information material to a criminal proceeding and was likely to flee before seeking a material witness warrant:

- David Nahmias, Counsel to the Assistant Attorney General, stated that when they were unable to charge a particular suspect, they "*got enough information* at least to make him a material witness." ER 32 (emphasis added).
- Attorney General Alberto Gonzales, Ashcroft's successor, stated that when the agency became interested in a subject, the agency would "consider" its options. ER 31.

Al-Kidd's pleadings do establish that some material witnesses were detained who did not testify or did not prove to have material information. But these facts do not plausibly suggest federal agents employed intentional or reckless mendacity in swearing out false affidavits. Some witnesses' testimony may not have been required because defendants took plea deals or prosecutors found other sources of information. In some cases, agents may simply have been wrong or may have acted "hastily" or negligently in conducting investigations.

That does not amount to a *Franks* violation. *See Franks*, 438 U.S. at 165, 98 S. Ct. 2674. That the DOJ apologized to some detainees hardly suggests an admission of impropriety rather than simple error.

The majority also concludes al-Kidd has plausibly alleged that Ashcroft "purposely instructed his subordinates to bypass the plain reading of the statute." Maj. Op. at 976. All of the allegations the majority cites in support of this proposition demonstrate Ashcroft "purposely instructed" his subordinates to use the statute *pretextually*, but not *unlawfully*. The majority doesn't get it; al-Kidd must plead not only that Ashcroft had a "concerted strategy" or that Ashcroft used "enhanced" techniques, Maj. Op. at 977, but that such "concerted strategy" or "enhanced" techniques actually included the use of false affidavits or facially invalid warrants, not just the use of pretextual witness warrants. A "concerted strategy" or "enhanced" technique to "misuse" material witness warrants is not enough, unless such "misuse" includes the use of false affidavits, not just pretextual arrest warrants. And nothing in al-Kidd's allegations plausibly suggests Ashcroft instructed, encouraged, or tolerated his subordinates to detain individuals as to whom there was no objective probable cause to arrest. It may be conceivable *to al-Kidd* that Ashcroft encouraged his subordinates to flout the requirements of § 3144, but al-Kidd's allegations have not "nudged [his] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Because al-Kidd has not pleaded adequately that Ashcroft, by his own actions, violated al-Kidd's constitu-

tional rights, I dissent from part B.4 of the majority opinion.

IV. Absolute Immunity

The remaining question is whether and to what extent Ashcroft enjoys absolute immunity for his alleged actions—and inactions-related to the issuance of material witness warrants. As explained above, I conclude all of al-Kidd's claims are precluded on other grounds. Accordingly, were it up to me, I would not reach this question. However, because the majority addresses the issue, and because I think the majority's "immediate purpose" test is difficult to define and apply, and is unsupported by case law, I will explain my disagreement.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), the Supreme Court held that a prosecutor enjoyed absolute immunity from suit by a former inmate, whose conviction had been set aside in collateral proceedings. The former inmate's suit alleged that the prosecution had been commenced wrongfully, that the prosecutor had elicited false testimony on the stand, and that the prosecutor concealed exculpatory evidence from the defense, actions even more heinous than those alleged against Ashcroft by al-Kidd. *Id.* at 415-16, 96 S. Ct. 984. The court articulated two justifications for imposing an absolute bar to recovery: first, absolute prosecutorial immunity reflects the common law immunity of judges and juries, *id.* at 424, 96 S. Ct. 984;[14] second, absolute immunity is necessary to avoid

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[14] Justice Scalia has observed that the doctrine of absolute prosecutorial immunity has strayed far from its common law roots, but that the doctrine nonetheless retains its vitality. *See Kalina v. Fletcher*, 522 U.S. 118, 131-135, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (Scalia, J.,

the "intolerable burdens" that damages claims by disgruntled criminal defendants would place on prosecutors, *id.* at 425-26, 96 S. Ct. 984. Absolute prosecutorial immunity obviously leaves some wrongs-grievous wrongs-unremedied, but the "balance of evils" nonetheless tilts in favor of absolute immunity; otherwise, prosecutors would live in constant fear that their actions on behalf of the public would subject them to personal liability and possible poverty. *Van de Kamp v. Goldstein*, — U.S. —, 129 S. Ct. 855, 859, 172 L. Ed. 2d 706 (2009).

However, despite the tremendous importance of absolute immunity, prosecutors do not enjoy absolute immunity for every act they undertake as prosecutors. To determine whether a prosecutor enjoys absolute immunity, rather than the lesser qualified immunity afforded all government agents, courts consider the "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127, 118 S. Ct. 502. Under the "functional approach," a prosecutor enjoys prosecutorial immunity only when he performs a function "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430, 96 S. Ct. 984. On the other hand, a prosecutor has no absolute immunity for "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate."

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concurring) ("[T]he 'functional categories' approach to immunity questions imposed by cases like *Briscoe*, make faithful adherence to the common law embodied in § 1983 very difficult. But both *Imbler* and the 'functional' approach are so deeply embedded . . . that, for reasons of *stare decisis*, I would not abandon them now."). Accordingly, Ashcroft's failure to introduce evidence that, at common law, prosecutors had absolute immunity against claims related to material witness warrants is not significant.

Id. at 430-31, 96 S. Ct. 984. The *Imbler* court acknowledged that "drawing a proper line between these functions may present difficult questions." *Id.* at 431 n. 33, 96 S. Ct. 984.

Deciding which witnesses to call at trial is part of the prosecutor's role as an advocate, *Imbler*, 424 U.S. at 431 n. 33, 96 S. Ct. 984, as is the "marshaling" of evidence for trial, *Genzler v. Longanbach*, 410 F.3d 630, 639 (9th Cir. 2005). Accordingly, several circuits, other than the Ninth, have squarely held that prosecutors have absolute immunity for seeking a material witness warrant.[15] And no case has held that absolute immunity does not shield a prosecutor's decision to seek such a warrant.

Ashcroft, of course, did not himself file the application or swear out the facts in support of the application. Ashcroft acted only as a supervisor. Though a supervisor's acts are in one sense always administrative, a supervisor enjoys absolute immunity only for supervisory decisions that "require legal knowledge and the exercise of related discretion" and relate to activities for which

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[15] *See, e.g., Odd v. Malone*, 538 F.3d 202, 213 (3rd Cir. 2008) (noting that a prosecutor has prosecutorial immunity for obtaining a material witness warrant shortly before the commencement of trial, but holding that the prosecutor lacks absolute immunity for failing to notify the court that trial was over and thus permit the witness's release); *Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984) ("It is clear that the issuance of the capias was intimately associated with procuring attendance of a witness for imminent trial. Absolute immunity attaches to this act, and any claimed improper motive is irrelevant."); *Daniels v. Kieser*, 586 F.2d 64, 69 (7th Cir.1978) ("Because defendant was attempting to secure Daniels' presence at the resumption of the trial[,] . . . he was functioning as an advocate rather than as an investigator."); *White ex rel. Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988) (stating, in dicta, that prosecutor's decision to procure a material witness warrant is protected by absolute immunity).

the supervised attorney enjoys absolute immunity. *Van de Kamp*, 129 S. Ct. at 861-62 (holding that a prosecutor enjoyed absolute immunity from Goldstein's claims that supervisor's failure to train prosecutors about the need to disclose exculpatory evidence resulted in his unlawful conviction). There is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." *Roe v. City & County of San Francisco*, 109 F.3d 578, 583-84 (9th Cir. 1997).

Kalina v. Fletcher makes clear Ashcroft lacks absolute immunity for claims related to his supervision of the FBI agents, such as Mace, who acted as witnesses in support of a warrant application. *See* 522 U.S. at 129-30, 118 S. Ct. 502. When an individual, even an attorney, serves as a complaining witness in support of a warrant application, the individual enjoys only qualified immunity, *id.*, and accordingly Ashcroft lacks absolute immunity for supervising such individuals. *See Roe*, 109 F.3d at 583-84. Whether Ashcroft enjoys absolute immunity for his supervision of the United States Attorneys who prepared the warrant application and made the decision to file it is a different question.

I would hold that so long as the "criminal proceeding" for which the material witness warrant is sought is a criminal trial, rather than an investigatory proceeding,[16] the decision to seek a material witness war-

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[16] *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274-75, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (holding that a prosecutor lacked absolute immunity for acts taken in preparation for appearing before an investigatory grand jury); *see also Bacon*, 449 F.2d at 939 (noting that a material witness warrant may issue to secure the presence of a witness before an investigative grand jury proceeding).

rant should be shielded by absolute immunity. Such a decision is clearly one "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430, 96 S. Ct. 984; *see also supra* note 14. The critical factor in the decision to seek a material witness warrant is the prosecutor's professional judgment about how much that witness knows, how important the witness's testimony might be, and what effect his arrest may have on his testimony. *See Kalina* 522 U.S. at 130, 118 S. Ct. 502 (holding that absolute immunity protects decisions involving the "exercise of professional judgment"). And the ultimate decision whether to call the detained witness depends on the prosecutor's final trial strategy, which may evolve over time as events unfold. *See Roe*, 109 F.3d at 583-84 (holding that a prosecutor's decision not to call a witness at trial was protected by absolute immunity). Both of these decisions are decisions that only a prosecutor can make.

Moreover, like other quasi-judicial acts, an individual's detention on a material witness warrant is subject to continuing oversight, and errors may be corrected through the judicial process. *Cf. Mitchell*, 472 U.S. at 522-23, 105 S. Ct. 2806 (holding that a prosecutor did not enjoy absolute immunity for his decision to engage in illegal wiretapping and explaining that the judicial process, unlike wiretapping, is "largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results").[17] Here, Al-Kidd was not detained

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[17] The Third Circuit's decision in *Odd* did not, as the majority concludes, hold that the policy considerations underlying absolute immunity do not apply in the material witness context. 538 F.3d 202. In *Odd*, no one questioned that the decision to *seek* a material witness warrant

up until the start of trial, but was released upon conditions, selected by a neutral magistrate, thought necessary to secure his appearance as a witness at trial.

Ultimately, the decision whether to seek a material witness warrant in conjunction with an upcoming trial is akin to both the decision to call a witness at trial and to seek a warrant to arrest a suspect. A prosecutor enjoys absolute immunity for both of these acts, regardless of any improper motive, and should enjoy a similar immunity here. *See Imbler*, 424 U.S. at 431 n.33, 96 S. Ct. 984; *Kalina*, 522 U.S. at 129, 118 S. Ct. 502.

Both the majority and al-Kidd concede that a prosecutor sometimes has absolute immunity for the decision to seek a material witness warrant. *See* Maj. Op. at 959-60. The majority, returning to its trope the prosecutors' pretextual motivations invalidate an otherwise

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was protected by absolute immunity. The issue in *Odd* was the prosecutor's "fail[ure] to notify the court of the status of a detained witness." *Id.* at 216. As the court noted, compliance with Rule 46, once trial is complete or during a "clearly delimited" break in judicial proceedings, is a purely ministerial task. *Id.* at 212-14. Unlike the decision whether to call a witness to the stand, the decision to release a material witness once trial is over requires the exercise of no professional judgment at all, and the threat of civil damages liability cannot interfere with the prosecutor's decision making. *Id.* at 216. It is unsurprising that the Third Circuit found that the detained material witnesses lacked access to continuing supervision; in *Odd* the plaintiffs' *very claim* was that they had been wrongfully denied the procedural protections to which they were entitled. *Id.* at 217 ("Indeed, the failure of the ADAs to notify anyone of Plaintiffs' status assured that not even the warrant-issuing judges would review the propriety of their continued detention, thus short-circuiting the crucible of the judicial process." (internal quotation marks omitted)). The ADAs had no more right to hold the material witness after the trial ended than they would have had to hold a defendant after an acquittal was entered.

properly obtained warrant, *see* Maj. Op. at 962-63, contends, however, the cases holding a prosecutor has absolute immunity for the issuance of a material witness warrant—*Odd, Betts, Daniels*, and *Swafford*—are distinguishable because none involved allegations a prosecutor intended to use the warrant to investigate the detained subject rather than to secure the witness's appearance at trial. *See* Maj. Op. at 959-60.[18]

Rejecting what it calls a "formalistic taxonomy of acts that are inherently either prosecutorial or investigative, regardless of what each act is *really* serving to accomplish" in favor of a "teleological perspective," Maj. Op. at 962 (emphasis added), the majority applies an "immediate purpose" test to determine whether a prosecutor is performing an investigative rather than a prosecutorial function—if the prosecutor's "immediate purpose" was to investigate the subject of the warrant rather than to secure the witness's appearance at trial, the prosecutor enjoys only qualified, rather than absolute, immunity. *Id.* at 962-63. Again the majority invites inquiry into the subjective motivations of individual officers. One can tell that easily: watch for its use of the word "really."

It is true that a few courts have made reference to "purpose" in applying the functional approach.[19] But the

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[18] The odd result of the majority's approach is that Ashcroft enjoys absolute immunity if he acts out of racial or partisan animus, but enjoys only qualified immunity if he acts in order to protect the public or investigate a suspected criminal. *See Bernard v. County of Suffolk*, 356 F.3d 495, 504 (2nd Cir. 2004). Thus, the more licit Ashcroft's subjective intentions, the more liability he faces.

[19] *See, e.g., Buckley*, 509 U.S. at 274-75, 113 S. Ct. 2606 (holding that prosecutor lacked absolute immunity for actions before a grand jury

"purpose" considered in these cases has been the product for which the warrant was directed—what evidence was called for and where it was to be produced; none of these cases authorizes the majority's wide-ranging inquiry into what a prosecutor was "really" up to. *See id.* at 962-63. Indeed, as in the Fourth Amendment context, courts have repeatedly admonished that a prosecutor's subjective intentions are irrelevant to the absolute immunity inquiry, for much the same reason they are irrelevant to the qualified immunity analysis. *See, e.g., Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc) ("Intent should play no role in the immunity analysis."); *see also Betts*, 726 F.2d at 81 (2d Cir.1984) ("Absolute immunity attaches to [seeking a material witness warrant], and any claimed improper motive is irrelevant."). The cases the majority cites are not to the contrary.

In *Buckley*, the Supreme Court held that a prosecutor lacked absolute immunity for fabricating evidence to present to a grand jury because the grand jury's "immediate purpose was to conduct a more thorough investigation of the crime-not to return an indictment against a suspect against whom there was already probable cause

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because the grand jury's "immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect against whom there was already probable cause to arrest"); *KRL v. Moore*, 384 F.3d 1105, 1115 (9th Cir. 2004) (denying absolute immunity where a search warrant was "to further a 'stand-alone investigation' into environmental crimes"); *Guzman- Rivera v. Rivera-Cruz*, 55 F.3d 26, 30 31 (1st Cir. 1995) ("The mixed purpose of the civil rights investigation reflects defendants' own mixed functions."); *Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir.1995) ("To the extent that the creation of the videotapes fulfilled an investigatory purpose, Adago cannot claim absolute immunity.").

to arrest." 509 U.S. at 274-75, 113 S. Ct. 2606. *Buckley* simply reflects the general rule that a prosecutor should not "consider himself to be an advocate before he has probable cause to have anyone arrested." *Id.* at 274, 113 S. Ct. 2606. In *Buckley*, no one had been arrested; the grand jury was still investigating. Here, Al-Hussayen had been indicted, arrested, arraigned, and was awaiting trial. *Buckley* merely holds that a prosecutor who, as yet, had arrested no one, was acting as an investigator, not an advocate. *Buckley* does not hold that what "really" motivated a prosecutor is relevant to determination of what "function" the prosecutor was accomplishing when he performed the action complained of.

Neither does *KRL v. Moore*. In that case, we held that whether a prosecutor had absolute immunity for the issuance of a search warrant depended on the purpose *of the warrant*, not *of the prosecutor* in seeking the warrant. 384 F.3d at 1115. After executing a search warrant on land held by KRL, a general partnership, prosecutors indicted Robert Womack, one of the partners, on counts relating to improper waste disposal on partnership land. *Id.* at 1108. The prosecutor then obtained a second search warrant for documents related to fraud and illegal diversion of funds. *Id.* at 1109, 1113. The partnership and the partners sued under § 1983, alleging that this second search warrant was overbroad, facially invalid, and based on fraudulent affidavits. *Id.* The district court denied the prosecutor's absolute immunity claim. On appeal, this court noted that the second search warrant had "two goals: it sought evidence to prosecute the pending indictment against Womack, and it sought to investigate and uncover new crimes." *Id.* at 1111. We held that the prosecutor enjoyed absolute immunity for the search warrant to the extent it

sought evidence to prove the pending charges. *Id.* at 1111-13. However, to the extent the prosecutor sought evidence of new crimes (fraud at KRL), the prosecutors lacked absolute immunity. *Id.* at 1113-14.

We did not inquire into the prosecutor's motives in seeking the second search warrant. We inquired into the purpose of the warrant by looking to what evidence the search warrant recited it sought. That evidence was not possibly related to the prosecution of Womack, the one suspect who had been arrested, for illegally dumping toxic wastes; it was evidence of fraud and diversion of funds that had nothing to do with waste disposal. *Id.* at 1113. It does not take a mind-reader to determine that where the subject matter of the prosecution is illegal toxic waste disposal on partnership land, a search warrant to search for evidence of fraud and illegal diversion of business funds is designed to accomplish something other than proving the elements of the charged environmental crime. It merely requires reading the warrant.

Buckley and *KRL* are easy to apply here: if the material witness warrant on which al-Kidd had been detained sought to force his appearance at an investigatory proceeding or a police interview, rather than a criminal trial, Ashcroft would not enjoy absolute prosecutorial immunity. The only relevant "purpose" is that derived from the product of the warrant, not what was "really" the prosecutor's motive in seeking the warrant.

To the extent that *KRL* authorizes any inquiry into what was "really" the prosecutor's motivation, such an inquiry should be strictly limited to cases where a prosecutor approves a *search* warrant application, because seeking the issuance of a search warrant can be an in-

vestigative function, while seeking an arrest warrant cannot. The *KRL* court itself carefully limited its holding to the search warrant context, and expressly distinguished the arrest warrant context. *Id.* at 1113 ("We must emphasize that our result would not necessarily be the same had the prosecutors reviewed an arrest warrant, rather than a search warrant, prior to submission. As noted supra, the Court has stated that a prosecutor does not serve as an advocate before probable cause to arrest anyone has been established, *Buckley* . . . , but that the determination of whether probable cause exists to file charging documents is the function of an advocate. . . . "). Preparing a search warrant is not a "core" advocacy function like the preparation of an arrest warrant, the filing of charges, or the preparation of a material witness warrant.[20]

But under the majority's approach, what was "really" a prosecutor's personal, subjective "immediate purpose" is always relevant to the determination whether absolute immunity protects *any* act by a prosecutor—in court or out of court. A prosecutor would lose his absolute immunity if he prosecutes a low-level mafia func-

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[20] *See generally Schrob v. Catterson*, 948 F.2d 1402, 1413-15 (3d Cir. 1991) (distinguishing "core" prosecutorial functions and describing search warrants as in the "gray area" between investigative and prosecutorial functions); *see also Joseph v. Patterson*, 795 F.2d 549, 556-57 (6th Cir. 1986) (recognizing that search warrants can serve both a prosecutorial function of preparing for trial and an investigative function of gathering evidence, and holding that further factual development was required to determine the role the search warrant played); *Imbler*, 424 U.S. at 431 n.1, 96 S. Ct. 984 ("Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluation of evidence. At some point, with respect to *some* decisions, the prosecutor no doubt functions as an administrator. . . . ") (emphasis added).

tionary for the sole purpose of inducing that functionary to testify against his capo. And, absolute immunity would not clothe any question asked by a prosecutor of a witness on the stand; the prosecutor could be sued for damages on the claim he "really" asked the question to assist in the investigation of the witness, or some other person, for other crimes. Of course, what the prosecutor "really" intended in asking the question would—as in all inquiries into intent—be a factual inquiry, entailing precisely the kind of expensive discovery and litigation immunity was designed to avoid. *See Harlow*, 457 U.S. at 816-817, 102 S. Ct. 2727.

Not so, says the majority. To "cabin" this obviously problematic result, the majority states that when a prosecutor brings any prosecution, the prosecutor's "immediate purpose" is, of course, to bring a prosecution, even if the prosecutor's true intention is to obtain evidence for some other investigation. Maj. Op. at 962-63. But there is no principled reason this is true, other than the majority's say-so. And, if true, why isn't the prosecutor's "immediate purpose" in this case to secure a witness's appearance at trial rather than to obtain evidence against al-Kidd? The majority provides no clues as to how we are to distinguish which purposes are "immediate" and which are "really" not.

Even were the "immediate purpose" test coherent, it would nonetheless be undesirable because of the incentives it creates. The prosecutors' ultimate decision not to call al-Kidd to the stand features prominently in al-Kidd's proof that their "immediate purpose" was not to obtain a conviction against Al-Hussayen. Subjecting prosecutors to liability for such a decision risks needless interference in the prosecutor's conduct of his most pub-

lic function: the presentation of evidence at trial and, indeed, deciding whether to have a trial at all. Worse, the majority's test makes it prudent for a prosecutor to go to trial against a defendant simply to ensure that his actions in preparing for trial will not become subject to attack on the grounds they were "really" designed to accomplish some other goal.

V. Conclusion

The majority opinion closes with a quote from Blackstone. What Blackstone describes and condemns therein—the indefinite and secret detention of individuals accused of no crime in harsh conditions-is simply not a description of this case. Even the majority agrees that the harsh conditions of al-Kidd's confinement are not before us because al-Kidd has not adequately pleaded John Ashcroft's personal responsibility for such conditions. Al-Kidd's confinement was neither indefinite nor in secret. He was detained on a warrant issued by a neutral magistrate. The duration of that confinement was subject to continuing judicial supervision. There is no allegation that al-Kidd was held incommunicado. Nor is there any allegation al-Kidd was somehow denied the right to petition for a writ of habeas corpus, a right that has long secured individuals' freedom from the horrors Blackstone envisioned. We are not called upon to judge the constitutionality of the material witness statute. And we are not called upon to judge whether al-Kidd should be released, only whether he is entitled to proceed in his suit to recover money damages from the pocket of a cabinet-level official. Were we presented with the Blackstonian case the majority envisions, I would surely

agree.[21] But we are not, and for the reasons explained above, I dissent in part and concur in part.

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[21] Although I would distance myself from a certain measure of bristling righteousness in its remarks that al-Kidd was a U.S. citizen, married and with children at the time of his arrest. Maj. Op. at 951. For all of that, his rights under the Constitution against unlawful arrest were no greater than those of an illegally entered, Mexican, childless spinster.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-36059

ABDULLAH AL-KIDD, PLAINTIFF-APPELLEE

v.

JOHN ASHCROFT, ATTORNEY GENERAL, BOISE,
DEFENDANT-APPELLANT

Mar. 18, 2010

ORDER

Before: DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR., Circuit Judges.

Judge M. Smith voted to deny the petition for rehearing en banc, and Judge Thompson so recommended. Judge Bea voted to grant the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. Judge Bybee was recused in this matter.

The petition for rehearing en banc is DENIED.

M. SMITH, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the court's decision not to rehear this case en banc, and write to respond to the dissents from that decision.

In March 2005, al-Kidd brought suit in the District of Idaho against former United States Attorney General John Ashcroft, the United States, two FBI agents, and a number of other government agencies and officers in their official capacities. The suit sought damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), for violations of al-Kidd's rights under the Fourth and Fifth Amendments to the Constitution, and for a direct violation of 18 U.S.C. § 3144. Each of the defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). The district court first denied the 12(b)(2) motion, holding that al-Kidd had properly alleged facts sufficient to establish personal jurisdiction over the parties in Idaho. Next, the district court denied the 12(b)(6) motion, rejecting the defendants' claims of absolute and qualified immunity. Only Ashcroft appealed the district court's rulings on the motions. In ruling on Ashcroft's interlocutory appeal of the district court's 12(b)(6) ruling, we are required to accept all allegations of material fact contained in al-Kidd's complaint as true and to construe those allegations in the light most favorable to al-Kidd. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). "Were this case before us on summary judgment, and were the facts pled in the complaint the only ones in the record, our decision might well be different. In the district court, moving forward, al-Kidd will bear a significant burden.

. . . ." *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009).

All the parties to this action have approached it as a pure law enforcement matter. Ashcroft has not raised issues of national security or other exigencies at any point in this litigation. *Id.* at 973.

The facts alleged in al-Kidd's complaint are chilling, and serve as a cautionary tale to law-abiding citizens of the United States who fear the excesses of a powerful national government, as did many members of the Founding Generation. Al-Kidd, born Lavoni T. Kidd, is a United States citizen, born in Wichita, Kansas, and raised in Seattle, Washington. He graduated from the University of Idaho, where he was a highly regarded running back on the university's football team. He was married and had two young children.

While at the university, al-Kidd converted to Islam and changed his name to Abdullah al-Kidd. In the spring and summer of 2002, al-Kidd became a target of FBI surveillance conducted as part of a broad anti-terrorism investigation, aimed at Arab and Muslim men.[1] Al-Kidd cooperated with the FBI on several occasions when FBI agents asked to interview him.

Previous to this time, Ashcroft and others operating at his direction, or in concert with him, had decided to undertake a novel use of 18 U.S.C. § 3144, the material witness statute. Specifically,

1. At a press briefing, Ashcroft stated that the government was taking steps "to enhance [its] ability to protect the United States from the threat of

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[1] Al-Kidd is Muslim, but is African-American and not of Arab descent.

terrorist aliens" and that "[a]ggressive *detention* of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying new attacks."

2. In DOJ memoranda, Ashcroft stressed the need "to use . . . aggressive arrest and detention tactics in the war on terror" and to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities."

3. A DOJ document entitled "Maintaining Custody of Terrorism *Suspects* " stated that "[i]f a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him *or pursuant to a material witness warrant.*"

4. Michael Chertoff, who was head of the DOJ's Criminal Division in the years immediately following the 9/11 attacks, stated of the material witness statute, "[i]t's an important investigative tool in the war on terrorism. . . . Bear in mind that you get not only testimony—you get fingerprints, you get hair samples – so there's all kinds of *evidence* you can get from a witness.

5. Then White House Counsel, Alberto Gonzales, stated that: "In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relative agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention

> as a *material witness*, and detention as an enemy combatant."

(emphasis added).

What apparently interested the FBI in al-Kidd was his friendship with one Sami Omar Al-Hussayen, a Saudi national and a computer science student at the university, who was the webmaster of an Islamic proselyting website dedicated to, among other things, "[s]pread[ing] the correct knowledge of Islam; [and] [w]iden[ing] the horizons and understanding . . . among Muslims concerning different Islamic contemporary issues."

In the spring of 2003, al-Kidd planned to fly to Saudi Arabia to study Arabic and Islamic law on a scholarship at a Saudi university. Knowing of his travel plans from their interviews with al-Kidd, and apparently implementing Ashcroft's plan to aggressively use the material witness statute to detain "material witnesses," two FBI agents swore out an affidavit that contained multiple falsehoods to secure a material witness warrant against al-Kidd, allegedly so he would be available to testify against Al-Hussayen (who had been indicted one month previously for visa fraud and making false statements to U.S. officials).

On March 16, 2003, al-Kidd, bearing a round-trip ticket to Saudi Arabia, arrived at Dulles International Airport in Virginia. While al-Kidd was at the ticket counter, FBI agents handcuffed him, perp-walked him through the airport, and drove him to a police station, where he was placed in a holding cell. After being detained and questioned there for hours, al-Kidd was transferred to a detention center in Alexandria, Virginia.

For the next sixteen days, al-Kidd was detained in three different detention centers, one in Alexandria, one in Oklahoma, and one in Idaho. He was housed in high-security units within these facilities, which were the same units used to detain terrorists, and other persons charged with, or convicted of, other serious crimes. While at the Alexandria facility, al-Kidd was required to remain in a small cell where he ate his meals, except for one or two hours a day. He was strip-searched, denied visits by family, and denied requests to shower. Each time he was transferred to a new facility, he was shackled and accompanied by other prisoners who had been charged with, or convicted of, serious crimes. After sixteen days, "al-Kidd was ordered released, on the conditions that he live with his wife at his in-laws' home in Nevada, limit his travel to Nevada and three other states, report regularly to a probation officer and consent to home visits throughout the period of supervision, and surrender his passport." *al-Kidd*, 580 F.3d at 953.

Not too long after al-Kidd's arrest and detention, in congressional testimony regarding the government's efforts to fight terrorism, FBI Director Robert Mueller boasted that the government had charged over 200 "suspected terrorists" with crimes. Mueller then offered the names of five individuals as examples of the government's recent successes. Four of those persons had been criminally charged with terrorism-related offenses; *the other was al-Kidd*.

"After almost a year under these conditions, the court permitted al-Kidd to secure his own residence in Las Vegas, as al-Kidd and his wife were separating. He lived under these conditions for three more months before being released at the end of Al-Hussayen's trial,

more than fifteen months after being arrested.[2] In July 2004, al-Kidd was fired from his job. He alleges he was terminated when he was denied a security clearance because of his arrest. He is now separated from his wife, and has been unable to find steady employment. He was also deprived of his chance to study in Saudi Arabia on scholarship." *Id.* at 953-54 (emphasis added).

Al Kidd was arrested more than a year before the Al-Hussayen trial began. In their interviews with al-Kidd, the FBI never suggested, let alone demanded, that al-Kidd appear as a witness in the Al-Hussayen trial. *While in custody, al-Kidd was repeatedly questioned about matters unrelated to Al-Hussayen's alleged visa violations or false statements, but was never given a Miranda warning.* "Al-Kidd was *never called as a witness* in the Al-Hussayen trial or in any other criminal proceeding" despite his assurances that he would be willing to be a witness. *Id.* at 953-54, 963 (emphasis added). Importantly, *al-Kidd* was *never charged with the commission of any crime,* even though Mueller had boasted to Congress that the government had at that point in time charged over 200 "suspected terrorists" with crimes, and named al-Kidd individually, as well as four other persons who had been criminally charged with terrorism-related offenses, as evidence of the government's recent successes.

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[2] "Al-Hussayen was not convicted of any of the charges brought against him. His trial ended in acquittal on the most serious charges, including conspiracy to provide material support to terrorists. After the jury failed to reach a verdict on the remaining lesser charges, the district court declared a mistrial. The government agreed not to retry Al-Hussayen and deported him to Saudi Arabia for visa violations." *Id.* at 953 n.4 (internal citation omitted).

Accepting al-Kidd's factual allegations as true and drawing all inferences in his favor, we held that al-Kidd alleged sufficient facts in his complaint to state a claim against Ashcroft for creating, authorizing, implementing, and supervising a policy that violated al-Kidd's Fourth Amendment right against unreasonable searches and seizures. In doing so, we determined Ashcroft was not entitled to absolute or qualified immunity because he served an investigative function in connection with the challenged policy, which violated al-Kidd's clearly established constitutional rights. We also held that al-Kidd alleged sufficient facts in his complaint to state a claim that Ashcroft directly violated the material witness statute by his own personal conduct. Accordingly, we affirmed the district court's decision, allowing al-Kidd's case to proceed against Ashcroft beyond the pleading stage.

I

Contrary to what our dissenting colleague suggests, we did not "effectively declar[e] the material witness statute unconstitutional." O'Scannlain Dissent at 1139. Judge O'Scannlain accuses the majority of holding that the Constitution "invalidates arrests *authorized by the statute*," and therefore, the statute is unconstitutional to the extent it authorizes arrests *such as the one in this case*. *Id.* at 1139 n.4 (emphasis added). The material witness statute, however, *does not authorize arrests like the one in this case*.

Here, the statute was not used to secure the testimony of a material witness, but rather to detain and interrogate a criminal suspect. Indeed, al-Kidd contends that the federal government enforced a policy sanctioning the use of the constitutionally-sound material wit-

ness statute for an end entirely outside the scope of the statute-criminal investigation. Therefore, we did not address the validity of the material witness statute, and we unequivocally stated that the decision "does nothing to curb the use of the material witness statute for *its stated purpose.*" *al-Kidd*, 580 F.3d at 970 (emphasis added). We treated "only the misuse of the statute," and concluded that when the statute "is *not* being used for its stated purpose, but instead for the purpose of criminal investigation," the statute cannot be the basis for authorizing the government's conduct. *Id.*

II

Judge O'Scannlain also accuses the majority of "distort[ing] the bedrock Fourth Amendment principle that an official's subjective reasons for making an arrest are constitutionally irrelevant," in contravention of *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). O'Scannlain Dissent at 1139. In *Whren*, the Supreme Court held that an individual officer's subjective intentions are irrelevant to the validity of a traffic stop under the Fourth Amendment. *Id.* at 810-13. But al-Kidd's case does not involve an ordinary traffic stop.

Whren stands for the proposition that " '[s]ubjective intentions play no role in *ordinary*, probable-cause Fourth Amendment analysis.' " *Id.* at 813, 116 S. Ct. 1769 (emphasis added). But outside that context, "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions taken pursuant to a *general scheme* without individualized suspicion." *City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (emphasis added).

Unlike the lawsuit in *Whren,* al-Kidd's suit does not involve a typical application of Fourth Amendment principles. *See Whren,* 517 U.S. at 819, 116 S. Ct. 1769. Al-Kidd claims that Ashcroft implemented a *policy* or *program* sanctioning the arrest and detention of individuals suspected of terrorism under the guise of the material witness statute. Therefore, al-Kidd's claims against Ashcroft do not hinge on one officer's basis for probable cause that al-Kidd committed a crime, but rather on the government's "intrusions undertaken pursuant to a general scheme without individualized suspicion." *Edmond,* 531 U.S. at 45-46, 121 S. Ct. 447. For these reasons, *Whren* does not furnish the appropriate Fourth Amendment analytical framework for reviewing al-Kidd's claims, and as a result, we properly looked to *Edmond* and related cases that have employed a programmatic purpose test to gauge the constitutionality of a program or policy.

Our colleague contends that the programmatic purpose test is applicable only in cases involving warrantless searches. But here, accepting al-Kidd's allegations as true, this case *does* involve a warrantless search and seizure, as federal agents did not have a warrant to arrest al-Kidd for his commission of terrorism-related crimes.[3] Therefore, the programmatic purpose test was

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[3] Judge O'Scannlain contends there was a warrant in this case, as federal agents possessed a warrant pursuant to the material witness statute. But a warrant is not a carte blanche for officers to do anything they desire under the auspices of the warrant. *See Malley v. Briggs,* 475 U.S. 335, 345-46, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (holding that an officer's act of applying for a warrant *per se* does not entitle the officer to qualified immunity). A warrant cannot pass constitutional muster if the scope of the related search or seizure exceeds that permitted by the terms of the validly issued warrant. *See Bivens,* 403 U.S.

appropriate in light of the allegations in this particular case. Certainly, there are "challenges inherent in a purpose inquiry," but nonetheless, "courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive government from that which is lawful." *Id.* at 46-47, 121 S. Ct. 447.

III

Judge O'Scannlain also challenges the majority's holding that al-Kidd's Fourth Amendment right at issue in this case was clearly established in 2003. The doctrine of qualified immunity seeks to ensure that governmental officials have "fair notice" that their specific actions violate a constitutional right. *Hope v. Pelzer*, 536 U.S. 730, 739-40, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). "It is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of the defendants' actions] was apparent in light of preexisting law." *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741, 122 S. Ct. 2508. In fact, the absence of cases evaluating whether certain policies are constitutional "may be due more to the obviousness of the illegality than the novelty of the legal issue." *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002). And where the courts do not have the benefit of factually analogous case law to assist with illuminating the parameters of the constitutional right, "general

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at 394-95 n.7, 91 S. Ct. 1999. Here, al-Kidd's complaint alleged that the issued material witness warrant was executed to arrest al-Kidd for being a terrorist suspect, not as a material witness. Therefore, the warrant upon which Judge O'Scannlain bases his argument cannot reach the arrest of al-Kidd for criminal law violations.

statements of the law" and "general constitutional rule[s] already identified in the decisional law" can adequately furnish the required fair warning to government officials about the constitutionality of their conduct. *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

Accepting the factual allegations in al-Kidd's complaint as true, and drawing all inferences in his favor, we determined that in light of the well-established Fourth Amendment principles in place at the time of al-Kidd's arrest, Ashcroft had a fair warning that the policy he authorized and encouraged was unconstitutional. Under *Beck v. Ohio*, Ashcroft knew that an arrest of a criminal suspect is constitutional only if at the time of the arrest, there is probable cause that the arrestee has committed or is committing the offense justifying the arrest. 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). Under *Edmond*, Ashcroft was on notice that "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion," and that a program whose primary purpose is indistinguishable from "the general interest in crime control" violates the Fourth Amendment. 531 U.S. at 45-48, 121 S. Ct. 447. Because Ashcroft's alleged conduct was "so patently violative" of such well-established Fourth Amendment principles, "closely analogous preexisting case law [was] not required to show that the law [was] clearly established." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (internal quotation marks omitted).

Only after we considered those well-established Fourth Amendment principles did we address a timely district court decision featuring a factual scenario

closely analogous to that faced by al-Kidd. In *United States v. Awadallah*, Awadallah, like al-Kidd, was detained as a "material witness" for over two weeks in high-security prisons across the country, where he was kept in solitary confinement, shackled, strip-searched, and denied family contact. 202 F. Supp. 2d 55, 58 (S.D. N.Y. 2002). We recognized that the district court's statements in *Awadallah* were merely dicta, and that ultimately Awadallah was charged with criminal offenses. Nevertheless, the facts at issue in *Awadallah* were so closely analogous to those in *al-Kidd* that we deemed them relevant to the discussion, especially in light of our court's admonition to consider *all* relevant decisional law. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003) ("[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of . . . district courts." (internal quotation marks omitted)); *see also Sorrels*, 290 F.3d at 971 ("[U]npublished decisions of district courts may inform [a court's] qualified immunity analysis."). Further, if anyone in the United States is presumptively on notice of cases involving federal law enforcement officers and the DOJ, it is the nation's top law enforcement officer.

We did not stake the existence of the clearly established right in this case on the district court's statements in *Awadallah*. Rather, the district court's comments in *Awadallah* were unsurprising and entirely consistent with the long-established Fourth Amendment principles upon which we principally relied for our holding. Thus, we properly included a reference to *Awadallah* in considering whether al-Kidd had a clearly established right in March 2003.

IV

Lastly, Judge O'Scannlain misreads the majority's decision as holding that a cabinet-level official may be personally liable for actions taken by his subordinate alone. To the contrary, the holding fully complies with the Court's instruction in *Ashcroft v. Iqbal*, that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." — U.S. —, —, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009). Al-Kidd was not required to allege that Ashcroft actually authorized the specific warrant for al-Kidd, or any alleged misrepresentations or omissions contained therein. Under *Iqbal*, al-Kidd had to "plead sufficient factual matter to show that [Ashcroft] adopted and implemented the detention policies at issue" not for some neutral, lawful reason but for an unlawful purpose. *Id.* at 1948-49.

The complaint claims Ashcroft created, adopted and implemented a policy of using the material witness statute for an unlawful end. The complaint contains numerous factual allegations supporting that theory, specifically referring to Ashcroft's liability for his own personal involvement with creating, implementing, and enforcing the alleged policy at issue in this case. The complaint also contains statements made by Ashcroft himself in support of such a policy, including his statements that law enforcement was to use "every available law enforcement tool" to arrest persons "who participate in, or lend support to, terrorist activities," that it was the government's policy "to use . . . aggressive arrest and detention tactics in the war on terror," and that "[a]ggressive detention of lawbreakers and material witnesses [was] vital to preventing, disrupting or delaying new

attacks." Thus, al-Kidd's § 3144 claim is not based upon allegations that Ashcroft simply knew or should have known that federal agents were actually violating or had the potential to violate the material witness statute in connection with the alleged policy; rather the complaint is based upon allegations of Ashcroft's *own* misconduct in sanctioning and promulgating a nationwide policy that systematically authorized the misuse of the material witness statute to arrest and detain suspected terrorists for whom the government had insufficient evidence of any wrongdoing.

Al-Kidd's case came before us in a Rule 12(b)(6) posture, and as such, we have an obligation to assume the allegations in al-Kidd's complaint are true, whether discovery would bear them out or not. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable[.]"). Accepting al-Kidd's factual allegations as true, we concluded that Ashcroft created, authorized, supervised, and enforced a policy that used the material witness statute in contravention of the Fourth Amendment, and that Ashcroft directly violated the material witness statute by his own personal involvement with the challenged policy.

However well-motivated Ashcroft's intentions may have been in creating, authorizing, supervising, and enforcing the misuse of the material witness statute in contravention of the Fourth Amendment, his motivation does not presumptively immunize the policy, or himself, the nation's chief law enforcement officer, and others implementing and executing it, from complying with the rule of law. "No man in this country is so high that he is

above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220, 1 S. Ct. 240, 27 L. Ed. 171 (1882).

V

Finally, my dissenting colleagues express concerns that the court's decision in this case will dissuade qualified individuals from seeking the position of Attorney General and exercising the full range of their authority if chosen to fill that office. While I acknowledge their concerns, I note that cabinet officers are regularly sued in the courts of the United States, and that the government defends them both individually and in their official capacities, as necessary. I understand that 100% of Ashcroft's attorney fees incurred to date in this case have been paid by the United States. *See* 28 C.F.R. § 50.15(a), (b). Moreover, in the event Ashcroft is ultimately held personally liable in this lawsuit for his actions against al-Kidd, he will almost certainly be eligible to claim indemnification from the United States. *See* 28 C.F.R. § 50.15(c).

The truth is that there are legions of highly qualified attorneys who would gladly abandon almost any other position for the opportunity to serve as Attorney General of the United States. But it is critically important that whoever serves in that position be dedicated to the rule of law, and to upholding and defending the Constitution of the United States. Mindful that some in high office can be guilty of excessive zeal, former Justice Brandeis, in his famous dissent in *Olmstead v. United States*, stated:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

277 U.S. 438, 48 S. Ct. 564, 572-73, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

The majority stands by its decision in this case, firm in the belief that it complies fully with controlling Supreme Court case law and the Constitution of the United States.

O'SCANNLAIN, Circuit Judge, joined by KOZINSKI, Chief Judge, and KLEINFELD, GOULD, TALLMAN, CALLAHAN, BEA and IKUTA, Circuit Judges, dissenting from the denial of rehearing en banc:

The majority holds that a former Attorney General of the United States may be *personally liable* for promulgating a policy under which his subordinates took actions expressly authorized by law. Judge Bea's dissent from the panel decision clearly and ably describes the several legal errors the panel makes in reaching this startling conclusion. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 981-1000 (9th Cir. 2009) (Bea, J., dissenting). For my part, I write to express my concern at the scope of this decision. First, the majority holds that al-Kidd's detention under a *valid* material witness warrant violated his clearly established constitutional rights-a conclusion that effectively declares the material witness statute unconstitutional as applied to al-Kidd. Second, the majority holds that a cabinet-level official may be

personally liable for actions taken by his subordinates alone. Because of the gratuitous damage this decision inflicts upon orderly federal law enforcement, I must respectfully dissent from our refusal to rehear this case en banc.

I

On March 14, 2003, federal prosecutors sought a material witness warrant[1] to arrest Abdullah al-Kidd in connection with their prosecution of Sami Omar Al-Hussayen, whom a federal grand jury had indicted for visa fraud and making false statements to U.S. officials. According to a supporting affidavit submitted by prosecutors, al-Kidd had contacts with Al-Hussayen's suspected Jihadist organization, had received over $20,000 from Al-Hussayen, and, after returning from a trip to Yemen, had met with Al-Hussayen's associates. The affidavit also stated that al-Kidd had a plane ticket to fly to Saudi Arabia two days later, and that if he left the country, the government would "be unable to secure his presence at trial via subpoena." Based on this affidavit,

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[1] The federal material witness statute, 18 U.S.C. § 3144, provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

a federal magistrate judge issued the warrant authorizing al-Kidd's arrest.

On March 16, federal agents arrested al-Kidd at the ticket counter at Dulles International Airport, outside Washington, D.C. After his arrest, the government detained al-Kidd for a total of sixteen days at several different federal facilities before releasing him on conditions that he surrender his passport, live with his wife at his in-laws' home in Nevada, limit his travel to Nevada and three other states, and regularly meet with a probation officer. The government did not ultimately call him to testify at Al-Hussayen's trial, and after the trial concluded, a judge granted al-Kidd's request that the restrictions on his travel be lifted.

Two years later, al-Kidd filed this lawsuit in the U.S. District Court for the District of Idaho. His first amended complaint alleges that Ashcroft violated the Fourth and Fifth Amendments and the federal material witness statute by promulgating a policy directing federal prosecutors to seek material witness warrants to detain individuals whom they believed, but could not prove, were involved in criminal activities. After the district court denied Ashcroft's motion to dismiss al-Kidd's complaint, Ashcroft appealed to this court.[2] The panel majority then affirmed the pertinent part of the district court's ruling in an extraordinarily broad and unprecedented decision.[3]

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[2] Al-Kidd's complaint also names several other federal officers and agencies as defendants. None of the other defendants appealed the district court's decision denying qualified immunity, and therefore al-Kidd's claims against them were not before the panel.

[3] In a portion of its opinion in which Judge Bea concurred, the majority reversed the district court's determination that Ashcroft was not im-

II

By permitting al-Kidd's suit to proceed, the majority commits two distinct but equally troubling legal errors, each of which will have far-reaching implications for how government officials perform their duties. First, the majority strips Ashcroft of his official immunity, holding that it was clearly established at the time of al-Kidd's arrest that prosecutors violate the Fourth Amendment when they obtain and execute a material witness warrant as a pretext for other law-enforcement objectives. Second, by holding that Ashcroft may be personally liable if his *subordinates* swore false affidavits to obtain the warrant authorizing al-Kidd's arrest, the majority stretches beyond recognition the rule that a government official is liable only when he personally violates the constitution. *See Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

A

1

The majority begins by effectively declaring the material witness statute unconstitutional, at least as applied to al-Kidd. But al-Kidd does not appear to contest that he met the statutory requirements for arrest as a material witness. *See al-Kidd*, 580 F.3d at 957. Nor does he contend that the material witness statute is *facially* unconstitutional. *Id.* at 966. The majority nevertheless holds that because prosecutors used a material witness warrant to arrest al-Kidd as a *pretext* to a criminal investigation, his detention violated the Fourth Amendment. This conclusion-that the material witness

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mune from al-Kidd's claim arising from the conditions of al-Kidd's confinement. *See al-Kidd*, 580 F.3d at 977-79.

statute authorized al-Kidd's arrest while the Fourth Amendment forbade it-can only mean that the material witness statute itself is unconstitutional in this circumstance.[4] With respect, such conclusion is preposterous.

The federal material witness statute has existed since 1789, *Bacon v. United States*, 449 F.2d 933, 938 (9th Cir. 1971), every state has adopted a version of the statute, *id.* at 939, and (at least until now), "[t]he constitutionality of th[e] statute apparently has never been doubted," *Barry v. United States ex rel Cunningham*, 279 U.S. 597, 617, 49 S. Ct. 452, 73 L. Ed. 867 (1929). The majority's decision to invalidate a statute passed by the First Congress and retained by every subsequent Congress should have *by itself* prompted us to rehear this case.

The majority does not stop at declaring a 200-year-old statute unconstitutional, however. It also distorts the bedrock Fourth Amendment principle that an official's subjective reasons for making an arrest are constitutionally irrelevant. The majority holds that if prosecutors used the material witness warrant as a *pretext* to arrest al-Kidd "with the *ulterior* and . . . unconstitu-

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[4] I acknowledge that the majority does not *say* that it is declaring the material witness statute unconstitutional. Nevertheless, that is what it *does*. The majority acknowledges that individuals arrested under the allegedly unconstitutional policy "met the facial statutory requirements of [the material witness statute]." *Al-Kidd*, 580 F.3d at 957. Despite this, in a section of its opinion entitled "*Al-Kidd's Fourth Amendment Rights Were Violated*," *id.* at 965, it concludes that al-Kidd's arrest was impermissible. By concluding that the Constitution invalidates arrests authorized by the statute, the majority must conclude that the statute is unconstitutional to the extent it authorizes arrests such as the one in this case-put another way, that the statute is unconstitutional as applied to al-Kidd.

tional *purpose* of investigating or preemptively detaining" him, they violated his Fourth Amendment rights. *Al-Kidd*, 580 F.3d at 957 (emphasis added). This holding is impossible to square with Supreme Court precedent, which has "flatly dismissed the idea that an *ulterior motive* might serve to strip the agents of their legal justification." *Whren v. United States*, 517 U.S. 806, 812, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (emphasis added). Given that al-Kidd has conceded that he met the facial requirements for arrest under the material witness statute, the prosecutor's purpose for arresting him is immaterial to the Fourth Amendment analysis because "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Scott v. United States*, 436 U.S. 128, 136-37, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978); *see also Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent[of the government official taking the action]." (internal quotation marks omitted)).

The majority, unfortunately, disagrees. Although it acknowledges that an officer's subjective intentions are irrelevant to "ordinary, probable-cause Fourth Amendment analysis," it holds that because al-Kidd's arrest was not supported by probable cause *that al-Kidd had committed a crime*, his detention was constitutionally infirm. *Al-Kidd*, 580 F.3d at 966. To reach this novel result, the majority relies on the Supreme Court's "programmatic purpose" test. *Id.* at 968-69. Contrary to the majority's analysis, that test is totally inapplicable here. The Supreme Court uses the programmatic purpose test to evaluate the constitutionality of *warrantless* searches.

See Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000). Because al-Kidd was arrested under a valid warrant, however, the programmatic purpose test, and its concern for the purpose of an arrest, is entirely inapplicable here. Thus, the majority concludes that the material witness warrant authorizing al-Kidd's arrest is unconstitutional only after examining the subjective reasons prosecutors sought the warrant, something the Supreme Court has repeatedly forbidden us to do. This error alone warranted en banc review.

2

The majority then compounds its error by holding that the right to be free from a detention under a pretextual material witness warrant was clearly established at the time of al-Kidd's arrest. The majority claims this result is compelled by three sources: the clearly established definition of probable cause, *al-Kidd*, 580 F.3d at 971, "the history and purposes of the Fourth Amendment," *id.*, and a footnote in a district court opinion, *id.* at 972 (quoting *United States v. Awadallah*, 202 F. Supp. 2d 55, 77 n. 28 (S.D. N.Y. 2002), *rev'd on other grounds*, 349 F.3d 42 (2d Cir. 2003)).

The majority's reliance on the first two sources proves too much, of course. All government officials are presumed to be aware of the definition of probable cause and the history and purposes of the Fourth Amendment. If this is sufficient clearly to establish how the Fourth Amendment applies in a particular setting, then how can *any* Fourth Amendment rule ever *not* be "clearly established"? *See Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

The majority's reliance on *Awadallah* is possibly even more troubling. The majority's assertion that three sentences of dicta in a footnote to a subsequently reversed district court opinion clearly establish a right that the majority expended nearly three-thousand words describing is truly astonishing.[5] Under the majority's reasoning, our government's officials may find themselves subject to suits for decisions that they did not-and, even if they spent their time doing nothing but reading reports of federal judicial decisions, could not-know contravened the Constitution. Indeed, the lack of support for the majority's conclusion is so glaring that even the editorial board of a distinguished newspaper remarked that "officials should not have to fear personal lawsuits for performing their duties in good faith and in violation of *no established legal* precedent." Editorial, *Suing Mr. Ashcroft: Why a Court's Decision to Allow a Personal Lawsuit Against the Former Attorney General Should Not Stand,* Wash. Post, Sept. 12, 2009, at A16 (emphasis added).

Thus, the majority has held that a former Attorney General might suffer personal liability solely for acting within the bounds of federal law. One shudders at the thought that this decision might deter the incumbent and future Attorneys General from exercising the full range of their lawful authority to protect the security of the United States.

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[5] In addition, the Chief Judge of the Southern District of New York has expressly declined to follow Awadallah. *See In re Application of U.S. for a Material Witness Warrant,* 213 F. Supp. 2d 287, 288 (S.D. N.Y. 2002).

B

The majority goes further still, however, by holding that Ashcroft may be held personally liable to al-Kidd if his *subordinates* provided false testimony in support of their application for a material witness warrant. *Al-Kidd*, 580 F.3d at 975-76. It cannot be contested that al-Kidd has a clearly established right to be free of an arrest based on fraudulent testimony. *See Franks v. Delaware*, 438 U.S. 154, 164-65, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Al-Kidd does not allege that Ashcroft *personally* swore any false testimony, however. Rather, it was Ashcroft's *subordinates* who provided the testimony that al-Kidd alleges was false. In light of *Iqbal*'s holding that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct," 129 S. Ct. at 1949, al-Kidd's complaint fails to allege facts sufficient to establish a cause of action against Ashcroft.

As Judge Bea explains in detail, al-Kidd does not allege that Ashcroft encouraged federal prosecutors to lie in applications for material witness warrants. *Al-Kidd*, 580 F.3d at 992-93 (Bea, J., dissenting). Al-Kidd does not claim that Ashcroft even *knew* that his subordinates might be submitting false affidavits. At most, al-Kidd claims that Ashcroft's policies encouraged his subordinates to use material witness warrants to detain individuals within the maximum extent authorized by law. *Id.* at 993. By permitting al-Kidd's claim that Ashcroft has violated *Franks* to proceed, the majority permits al-Kidd to seek damages from Ashcroft for his subordinates' alleged misconduct, a result indisputably at odds with *Iqbal*. *See* 129 S. Ct. at 1949.

After this decision, a prosecutor who executes a perfectly valid material witness warrant must worry that he will find himself sued and liable in damages for violating the Fourth Amendment. Moreover, any cabinet-level official must worry that he might be personally liable if his *subordinates* take an action perfectly *consistent* with then-existing federal law.[6]

Because these results are contrary to both logic and law, I respectfully dissent from our unfortunate rejection of the opportunity to correct these errors by rehearing this case en banc.

GOULD, Circuit Judge, with whom KOZINSKI, Chief Judge, and O'SCANNLAIN, KLEINFELD, CALLAHAN, BEA, and IKUTA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I agree with Judge Bea's persuasive dissent from the majority opinion and agree with Judge O'Scannlain's

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[6] The *possibility* the federal government might reimburse Ashcroft for any judgment against him hardly removes the likelihood that this decision might deter the current or future Attorneys General from carrying out their duties. *Anderson*, 483 U.S. at 641 n.3, 107 S. Ct. 3034 (noting that 28 C.F.R. § 50.15(c) "*permit*[*s*] reimbursement of Department of Justice employees when the Attorney General finds reimbursement appropriate"). Claims for reimbursement have been denied on occasion. *See Falkowski v. EEOC*, 719 F.2d 470, 472-76 (D.C. Cir. 1983) (arising after the government declined to represent a former employee in a lawsuit related to her employment), *vacated sub nom. U.S. Dep't of Justice v. Falkowski*, 471 U.S. 1001, 105 S. Ct. 1860, 85 L. Ed. 2d 155 (1985); *Turner v. Schultz*, 187 F. Supp. 2d 1288, 1290 (D. Colo. 2002) (same). Moreover, the decision to provide or to deny such reimbursement is entirely within the discretion of the current Attorney General, and is not subject to judicial review. *Falkowski v. EEOC*, 764 F.2d 907, 911 (D.C. Cir. 1985).

persuasive dissent from denial of rehearing en banc. I add this pragmatic concern: If an Attorney General of the United States can be held liable and subject to monetary damages primarily because of actions of law enforcement subordinates, who allegedly gained and executed a material witness warrant for contrived purposes, I fear that it will become more difficult to persuade a person of great talent and integrity to leave his or her current occupation in order to hold the nation's highest law office. The panel majority's decision in effect says "good bye" to many talented persons who would otherwise be willing to serve as Attorney General with great distinction and attendant benefit to our country.

OPPOSITION BRIEF

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(5)

No. 10-98

FILED

SEP 17 2010

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IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

—v.—

ABDULLAH AL-KIDD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In Question 2(a), the petition states that the issue is whether there is liability for "executing a valid material witness warrant." Respondent takes issue with that statement in two respects.

First, this case concerns the *procurement* of a warrant in Idaho pursuant to petitioner's policy. Unlike the two FBI agents who sought the warrant, the agents who *executed* the warrant and arrested respondent in Virginia are not defendants.

Second, respondent does not concede that the warrant was "valid." Even assuming that the material witness statute's materiality and impracticability requirements were met (18 U.S.C. 3144), the position of respondent (and the Ninth Circuit) is that both the Fourth Amendment *and* the statute itself prohibit a material witness arrest for the purpose of investigating a suspect, rather than for securing testimony.

2. Respondent will not pursue the claims in Question 3 of the petition if certiorari is granted. Similarly, if the petition is denied, respondent will abandon the claims in Question 3 in any further proceedings in the district court or Ninth Circuit.

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JURISDICTION

The petition invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The material witness statute, 18 U.S.C. 3144, provides in full:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by

> deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

The Fourth Amendment generally prohibits an arrest absent probable cause to believe there has been a violation of the law. *See Brinegar v. United States*, 338 U.S. 160, 175 (1949) ("probable cause is a reasonable ground for belief of guilt") (citations and quotation marks omitted). The federal material witness statute, however, authorizes the government to arrest a wholly innocent individual for the purpose of obtaining needed testimony that might otherwise be unavailable. The statute thus requires a showing before a magistrate that an individual has information "material" to a criminal proceeding and that it "may become impracticable" to secure the testimony by subpoena. 18 U.S.C. 3144. This case involves a gross abuse of the government's narrow power under the statute.

The complaint alleges that in the aftermath of September 11, 2001, dozens of individuals, including many United States citizens like respondent al-Kidd, were arrested as material witnesses pursuant to a policy adopted and implemented by petitioner Ashcroft. These individuals were often detained for weeks or even months, under harsh conditions. Moreover, as witnesses, they were not entitled to *Miranda* warnings under the government's reading of the law. Thus, they could, and were, routinely interrogated without counsel present.

The impetus for arresting these individuals was not to secure their testimony for a criminal proceeding. Rather, these were individuals whom

the government viewed as suspects and wished to detain and investigate. But because the government lacked probable cause to arrest these individuals on criminal charges, it had them arrested as material witnesses, thereby circumventing the Fourth Amendment's traditional probable cause standard and distorting the basic purpose of the material witness statute.

Indeed, the modern statute itself provides that the government should seek to depose a witness rather than unreasonably prolonging the period of confinement. *See* 18 U.S.C. 3144. The deposition requirement strongly reinforces that the statute's purpose is to provide the government with a means of securing needed testimony, and not to permit the government to detain and investigate *suspects* without regard to the traditional Fourth Amendment standard.

STATEMENT

On a motion to dismiss, all non-conclusory factual allegations are presumed true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). The allegations set forth below are taken virtually verbatim from the First Amended Complaint ("FAC").

A. Mr. al-Kidd's Arrest and Detention.

The respondent, Abdullah al-Kidd, is a 37-year-old African-American man born in 1972 in Kansas and raised near Seattle, Washington. His mother, father, siblings and two children are native-

born U.S. citizens who have always resided in the United States. Mr. al-Kidd graduated from the University of Idaho, where he was a well-known player on the football team. While he was attending college, he changed his name from Lavoni T. Kidd to Abdullah al-Kidd, and converted to Islam. FAC ¶¶ 39-40.

Following September 11, the government began a broad terrorism investigation in Idaho. As part of this investigation, the Federal Bureau of Investigation (FBI) conducted surveillance of Mr. al-Kidd and his then-wife (also a native-born U.S. citizen). The surveillance logs from that investigation indicated no illegal activity, and indeed, Mr. al-Kidd was never charged with a crime. FAC ¶¶ 9, 44.

In addition, on several occasions, the FBI asked to meet with Mr. al-Kidd. Respondent met with the FBI and answered questions for hours. At no time did he fail to appear for one of these requested meetings. FAC ¶¶ 15, 54(c).

In March 2003, Mr. al-Kidd was preparing to travel to Saudi Arabia to further his language and religious studies on a scholarship at a well-known university. While at the ticket counter at Dulles Airport in Virginia, Mr. al-Kidd was arrested by agents of the FBI on a material witness warrant issued in Idaho in the case of Sami Al-Hussayen, who previously had been indicted by an Idaho grand jury

for visa fraud and making false statements to the government. FAC ¶¶ 15, 42, 45-47, 65.[1]

The FBI agents did not give Mr. al-Kidd a copy of the warrant indicating that he was supposedly being arrested as a witness, and instead handcuffed him and walked him through the airport in front of staring onlookers. At the time of his arrest, Mr. al-Kidd was wearing religious clothing, making it clear that he was a Muslim man whom the government was arresting in an airport after September 11, adding to the already extensive and unnecessary humiliation. FAC ¶¶ 66-67.

The agents also did not provide Mr. al-Kidd with *Miranda* warnings or counsel. Instead, they brought him to a police sub-station in the airport and interrogated him (without counsel) for 1-2 hours on a variety of topics, including Mr. al-Kidd's *own* religious beliefs, conversion to Islam and his past travels. They also informed him that by cooperating he might still be able to take his flight to Saudi Arabia – a statement seemingly at odds with the government's previous representation to an Idaho Magistrate that Mr. al-Kidd's arrest as a material witness was necessary because he had "crucial" information for the upcoming Idaho trial of Sami Al-Hussayen. FAC ¶¶ 46, 66, 68.

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[1] The jury was unable to reach a verdict on these two charges. Al-Hussayen was also ultimately charged with providing material support but was acquitted on those more serious charges. The government did not retry Al-Hussayen on any of the charges.

Mr. al-Kidd spent the next 15 nights in jails in Virginia, Oklahoma and Idaho, under severe conditions. At each facility, he was placed in a high-security wing of the jail and mingled with charged or convicted criminals. In two of the three facilities, he was humiliatingly strip-searched. FAC ¶¶ 70-75, 83-87, 92-93, 95; *see, e.g.*, *Al-Kidd v. Sugrue*, No. CIV-06-1133-R, 2007 WL 2446750, at *8 (W.D. Okla. Aug. 23, 2007) (holding that Mr. al-Kidd's clearly established Fourth Amendment rights were violated because the warden "could not have reasonably believed in 2003" that strip-searches and body cavity inspections of "a material witness detainee such as the Plaintiff . . . did not violate the law").

When transferred between facilities, Mr. al-Kidd was treated as if he were a dangerous terrorist, and not a witness. Among other things, he was placed on a "Con Air" flight with hardened criminals and was routinely placed in full shackles like the other prisoners: his feet were chained together and his hands were cuffed to a belly chain that prevented any movement of his arms. FAC ¶¶ 71, 83-85, 92.

Mr. al-Kidd was eventually released from detention under strict conditions. Among other things, he was limited to a four-state area, required to live with his in-laws, and to report regularly to the government. More than fourteen months later, the trial for which Mr. al-Kidd's testimony was supposedly needed ended without conviction on a single count. Mr. al-Kidd was never called as a witness. Even at that point the government did not

immediately move to vacate the conditions of supervision, forcing Mr. al-Kidd to file a motion with the court in Idaho. FAC ¶¶ 9, 103, 106-07.

B. The Material Witness Warrant.

The affidavit submitted in support of the material witness warrant consisted of only three sentences directly pertaining to whether Mr. al-Kidd's testimony could be secured voluntarily or by subpoena, without the need for arrest:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.
>
> * * *
>
> It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

See FAC ¶ 49.[2] These statements turned out to be false. In fact, the government has since admitted that Mr. al-Kidd had a round-trip ticket, and not a one-way ticket as alleged in the affidavit (an

[2] The warrant application is an addendum to the First Amended Complaint. First Amended Compl. 1:05-cv-00093-EJL Docket Entry No. 40 (D. Idaho Nov. 18, 2005).

admission made only after Mr. al-Kidd had spent more than two weeks in detention). Furthermore, Mr. al-Kidd did not have a first-class ticket costing approximately $5,000, as alleged, but rather a coach-class ticket costing less than $2,000. FAC ¶¶ 14, 53.[3]

In addition to the false statements, the affidavit also failed to inform the magistrate of numerous material facts, including that:

- Mr. al-Kidd was not a Saudi national returning to his home country, but rather a native-born citizen with significant ties to the United States and Idaho (including that his family members were native-born U.S. citizens living in this country and that he had attended the University of Idaho);

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[3] One of the *amicus* briefs contends that the false statements are thin, suggesting that the affidavit's reference to a one-way ticket could just as easily have been understood as a reference to a roundtrip ticket with an open-ended return. Brief of William P. Barr et al. as *Amici Curiae* in Support of Petitioner at 22 n.7. But if that is truly what the government meant when it stated respondent had a "one-way" ticket, it chose an especially odd way to express it. Moreover, the harm done by that false statement is magnified when viewed in context. As the magistrate who received the affidavit surely knew, the 19 hijackers responsible for the September 11 attacks apparently had one-way, first-class tickets. Finally, and importantly, there can be no suggestion that the nature of the ticket was largely inconsequential, since the government's affidavit made that the central focus of the warrant application; in fact, as already noted, there was little else in the application pertaining to the impracticability of securing Mr. al-Kidd's testimony by subpoena.

- Mr. al-Kidd had voluntarily talked with the FBI on several occasions prior to his arrest and had never failed to show up to these pre-arranged meetings;

- prior to his arrest, Mr. al-Kidd had not heard from the FBI for approximately six months;

- the FBI had never told Mr. al-Kidd that he might be needed as a witness, that he could not travel abroad, or even that he should inform the FBI if he did intend to travel abroad; and finally,

- Mr. al-Kidd was never asked if he would be willing to testify, to voluntarily relinquish his passport or to otherwise postpone his trip to Saudi Arabia.

FAC ¶¶15, 54.

Tellingly, the affidavit also did not state that the government had attempted to locate Mr. al-Kidd prior to seeking the arrest warrant. Indeed, the affidavit nowhere stated that the government had made any effort to determine whether some action short of an arrest might be practicable. In this regard, it is notable that another witness in the Al-Hussayen case was permitted simply to relinquish his passport and postpone his trip to Saudi Arabia. That witness, moreover, was not a U.S. citizen like Mr. al-Kidd, but a Saudi national returning home. FAC ¶¶ 54(f), 57.

In addition, although the affidavit stated that Mr. al-Kidd's testimony was "crucial" to the

government's case, it never precisely explained what information Mr. al-Kidd possessed that was germane to the charges against Al-Hussayen. Instead, the affidavit contained largely irrelevant information or statements attempting to cast Mr. al-Kidd in a suspicious light. FAC ¶ 58. Among other things, the affidavit stated that Mr. al-Kidd and his wife had received payments from Al-Hussayen and Al-Hussayen's associates. In fact, the FBI agents requesting the warrant knew or reasonably should have known that Mr. al-Kidd worked for the same charitable Islamic organization as Mr. Al-Hussayen and received a salary for his work. FAC ¶¶ 58, 60.

The warrant application also perplexingly stated that Mr. al-Kidd had information critical for the *defense*. Yet the application was submitted *ex parte* by the government, without any suggestion that the government had consulted with defense counsel in making that unusual representation. FAC, Ex. A.

In short, the FBI simply blindsided a cooperative U.S. citizen months after it had last contacted him, without ever affording him the opportunity to testify voluntarily – all under the pretense that his testimony was critically needed for a future trial (a trial in which he was *never* called to testify).

C. Petitioner's Material Witness Policy.

According to the complaint, Mr. al-Kidd's arrest was not an isolated incident occurring in one trial in

Idaho, but was part of a pattern of material witness arrests that occurred after September 11 pursuant to a nationwide policy instituted by petitioner. That policy used the material witness statute as cover to detain and investigate suspects for whom the government lacked probable cause of wrongdoing.

That Mr. al-Kidd's arrest was not an isolated incident was evident from congressional testimony delivered by the FBI Director. Only days after Mr. al-Kidd's arrest, while respondent remained in detention, Director Mueller appeared before Congress and testified that the government had had a number of recent "successes" in combating terrorism and gave various examples. The first example was the capture of Khalid Shaikh Mohammed, alleged to be the "mastermind" of the September 11 attacks and now held at Guantanamo Bay. The next example was the arrest of Mr. al-Kidd. Director Mueller then listed three additional examples, all involving individuals who had been *charged* with terrorism-related offenses. Unbelievably, the Director's testimony did not mention that Mr. al-Kidd had been arrested only as a witness, and not on criminal charges. Instead, he stated:

> We are thoroughly committed to identifying and dismantling terrorist networks, and I am pleased to report that our efforts have yielded major successes over the past 17 months. Over 212 suspected terrorists have been

> charged with crimes, 108 of whom have been convicted to date. Some are well-known -- including Zacarias Moussaoui, John Walker Lindh and Richard Reid. But, let me give you just a few recent examples:
>
> In March, Khalid Shaikh Mohammed was located by Pakistani officials and is in custody of the US at an undisclosed location. Mr. Mohammed was a key planner and the mastermind of the September 11th attack. . . .
>
> On March 16, Abdullah al-Kidd, a US native and former University of Idaho football player, was arrested by the FBI at Dulles International Airport en route to Saudi Arabia. The FBI arrested three other men in the Idaho probe in recent weeks. And the FBI is examining links between the Idaho men and purported charities and individuals in six other jurisdictions across the country.

See FBI's Fiscal Year (FY) 2004 Budget: Hearing Before the H. Subcomm. on the Dep'ts of Commerce, Justice, and State, the Judiciary and Related Agencies, 108th Cong. (2003) (Mueller statement), http://www.fbi.gov/congress/congress03/mueller032703.htm; *see* FAC ¶ 100.

If Mr. al-Kidd had been viewed as a genuine witness, and not as a longstanding suspect, it is hard

to imagine that his arrest would have generated so much attention so quickly within the highest ranks of the Justice Department, to the point where it was mentioned in congressional testimony only a few days after his arrest – and mentioned directly after the capture of the man who allegedly orchestrated the September 11 attacks.

Indeed, had the Justice Department actually viewed Mr. al-Kidd as a genuine witness, and not a suspect, it is implausible that the FBI Director would even have *mentioned* respondent's arrest, much less cited it as one of the government's noteworthy "successes" in combating terrorism. And if Mr. al-Kidd was indeed a genuine *witness*, it is highly unlikely that that central fact would have been omitted from the Director's testimony.

Nor is Director Mueller's testimony the only evidence that Mr. al-Kidd's arrest was part of a nationwide policy of using the material witness statute to arrest suspects. Petitioner himself, as well as numerous other high-ranking Justice Department officials, routinely made statements about how the material witness statute would be used to detain and investigate *suspects*.

On October 31, 2001, for example, petitioner commented on the government's new policies, stating at a press briefing that the "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks" and that this policy would "form one part of the department's concentrated strategy to prevent

terrorist attacks by taking suspected terrorists off the street . . . ." FAC ¶ 117; *see id.* at ¶ 116 (alleging that petitioner developed a policy in which the "FBI and DOJ would use the material witness statute to arrest and detain terrorism *suspects*").

An internal DOJ document echoes this theme of using the material witness statute to arrest and hold suspects. The document, entitled "Maintaining Custody of Terrorism Suspects," includes the following statement: "If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant." FAC ¶ 118.

Similarly, senior counsel in the Deputy Attorney General's Office remarked that the "Criminal Division is examining each of the cases [of terrorist suspects in INS custody] to determine whether the person can be detained on criminal charges or on a material witness warrant if the person is ordered released from INS custody." FAC ¶ 119. Michael Chertoff, the head of the DOJ's Criminal Division in the years immediately following September 11, 2001, publicly highlighted the DOJ's use of the material witness statute, saying, "It's an important *investigative* tool in the war on terrorism. . . . Bear in mind that you get not only testimony – you get fingerprints, you get hair samples – so there's all kinds of *evidence* you can get from a witness." FAC ¶ 121 (quoting media interview, emphasis added).

FBI Director Mueller likewise touted the new material witness practice, stating in an April 2002 speech that "a number of *suspects* were detained on federal, state, or local charges; on immigration violations; or on *material witness* warrants." FAC ¶ 122 (emphasis added). On February 24, 2004, in a statement to the ABA then-White House Counsel Alberto Gonzales candidly described standard DOJ procedure for handling a terrorism suspect:

> In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a *material witness*, and detention as an enemy combatant.

FAC ¶ 123 (emphasis added in complaint).

On June 25, 2003, David Nahmias, Counsel to the Assistant Attorney General, Criminal Division, offered the Senate Judiciary Committee an example of how the DOJ tracked down an alleged terrorist: "[W]e developed . . . clear evidence that he had contact with an Al Qaida terrorist operative connected to 9/11. And so in December he was approached again . . . and [when] we weren't able to clear things at that point, he was actually made a

material witness." Nahmias stated that "we got enough information to at least make him a material witness and then to charge him criminally." FAC ¶ 124.

Public statements by other top officials who worked closely with the Justice Department in the development of post-9/11 policies confirmed the new material witness policies and practices. Mary Jo White, the U.S. Attorney for the Southern District of New York in the years immediately preceding and following September 11, 2001, summed up the policy: "Some of the criticism that has been leveled at [DOJ for its post-9/11 use of the material witness statute] is not wholly unjustified . . . . Does it really sort out to being in one sense preventative detention? Yes, it does, but with safeguards." FAC ¶ 120 (quoting media interview).

As importantly, the circumstances surrounding the arrest and detention of these supposed witnesses reinforce the statements made by petitioner and others and confirms that those arrested were actually viewed as suspects, and not genuine witnesses. Numerous material witnesses who were detained to secure their supposedly important testimony were never in fact called to testify. By one account, nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify. Further confirming their actual status as suspects, the government refused to grant many post-9/11 material witnesses immunity for their testimony,

although this traditionally has been a standard procedure for eliciting testimony from a witness. FAC ¶ 128.

Some individuals were designated as material witnesses only after already being arrested on another ground, strongly indicating that the government was using material witness warrants as a means of prolonging a suspect's detention. Many other individuals were arrested and detained as material witnesses even though there was no reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena. FAC ¶ 127 (describing material witness arrested and detained for three days in solitary confinement after willingly and voluntarily allowing the FBI to search his business records and computers).

Once arrested, material witnesses were routinely held in high security detention conditions, highlighting their true status as terrorism suspects, rather than witnesses. FAC ¶¶ 129-30. *See also United States v. Awadallah*, 202 F. Supp. 2d 55, 61 (S.D.N.Y. 2002) ("It was also decided 'early on' that '[w]ith respect to all of the folks who were being brought in as material witnesses and under investigation for the World Trade Center attacks . . . that [the MCC] would record their movements with a hand-held camera,' a policy that the prison had previously used with the 'African Embassy bombers.'"), *rev'd on other grounds*, 349 F.3d 42 (2d Cir. 2003).

The Justice Department also unreasonably prolonged the period of detention for material witnesses – by DOJ's own estimates about half of the witnesses it arrested in terrorism investigations were detained for more than thirty days, an astounding length of time given that the statute itself directs the government to take depositions of witnesses so that innocent individuals are not detained for unreasonably long periods. *See* FAC ¶ 133 (citing DOJ letter to Sensenbrenner and Conyers of the House Committee on the Judiciary, May 13, 2003). And even after being released from detention, many material witnesses were subjected to impermissibly restrictive release conditions – and yet were still never called to testify. FAC ¶ 134.

Exacerbating all of these abuses was the Justice Department's attempt to shield from public view the circumstances surrounding the arrest of material witnesses. Among other things, the Justice Department routinely requested that the records of material witness proceedings be sealed. The Justice Department also refused to make public the most basic information about the material witnesses it detained, including names or other identifying information, or the exact number of witnesses, even in the face of direct congressional inquiry. FAC ¶ 135.

D. Procedural History.

In light of these allegations, the district court (per Lodge, J.) properly held that petitioner was not entitled to immunity if the material statute was used as a cover to arrest suspects (the *pretext* claim). *Al-Kidd v. Gonzales*, No. 1:05-cv-00093-EJL-MHW, 2006 WL 5429570, at *7, *9 (D. Idaho Sept. 27, 2006) (stating that "[t]he development and practice of using the material witness statute to detain individuals while investigating possible criminal activity qualifies as police type investigative activity, not prosecutorial advocacy" and is not shielded by absolute or qualified immunity).

The Ninth Circuit properly affirmed that ruling on respondent's pretext claim, holding that petitioner was not entitled to absolute immunity because his policy was investigative, not prosecutorial, under this Court's functional test. Pet. App. 14a-27a. The court of appeals also rejected petitioner's argument that he was entitled to qualified immunity even if he used the material witness statute as a pretext to hold suspects for whom the government lacked sufficient evidence to charge with a crime. Pet. App. 40a-47a. As the court of appeals stated, the government does not have the

> power to arrest and detain or restrict American citizens for months on end, in sometimes primitive conditions, not because there is evidence that they have committed a crime, but merely because the government wishes to investigate

> them for possible wrongdoing, or to prevent them from having contact with others in the outside world.

Pet. App. 63a.

In addition to respondent's pretext claim, the court of appeals also addressed two additional issues. First, it held that petitioner could also be liable for the content of the affidavit submitted in support of Mr. al-Kidd's arrest (what the Ninth Circuit called the "Section 3144 Claim"). Pet. App. 47a-56a. As noted above, *supra* at i, that issue is no longer being pursued by respondent. The court of appeals also reversed the district court's ruling that petitioner could be held liable for the conditions of confinement under which Mr. al-Kidd was held. Pet. App. 56a-59a. Respondent has not sought further review of that holding.

Judge Bea dissented in relevant part. He would have afforded petitioner absolute and qualified immunity, on the principal ground that the court should not look behind petitioner's actions to examine the purpose of the material witness policy. Pet. App. 64a-105a.

The Ninth Circuit denied petitioner's request for en banc review, with 8 judges dissenting. Pet. App. 106a. Judge Smith wrote an opinion concurring in the denial of rehearing. Pet. App. 107a-122a. Judges O'Scannlain and Gould wrote dissenting opinions from the denial of en banc review. Pet. App. 122a-131a; 131a-132a.

ARGUMENT

This case is before the Court on a motion to dismiss, without any factual record. There is also no circuit conflict. Petitioner nonetheless argues that the Court's immediate review is warranted because he will otherwise be subjected to the burdens of discovery and because the Ninth Circuit's ruling creates uncertainty for prosecutors performing their everyday duties. Petitioner further contends that the Ninth Circuit's decision was incorrect and that review is warranted for that reason as well. None of these arguments support granting the petition.

I. THERE IS NO PRESSING NEED FOR THIS COURT'S REVIEW.

Petitioner does not contend that there is a circuit conflict on the issues presented by this case. Indeed, the courts that have addressed the issue have taken as a given that the government may not use its extraordinary power under the material witness statute as a cover to preventively detain and investigate suspects for whom it lacks probable cause of wrongdoing. *See United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) ("it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established"); *United States v. Awadallah*, 202 F. Supp. 2d 55, 77 (S.D.N.Y. 2002) ("Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order

to prevent potential crimes is an illegitimate use of the statute."), *rev'd on other grounds*, 349 F.3d 42; Pet. App. 40a (Ninth Circuit opinion) ("To use a material witness statute pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment."); *Al-Kidd v. Gonzales*, 2006 WL 5429570, at *6, 9 (holding that al-Kidd had alleged a constitutional violation if the material witness statute was used as a pretext to arrest and investigate suspects).[4]

Petitioner also obviously does not contend that this is the last opportunity the Court will have to review the case. If petitioner is found liable in the district court, and the Ninth Circuit affirmed that ruling, he would be able to seek review of that judgment in this Court. Thus, even if the petition is denied, petitioner would not face liability without this Court having had an opportunity to review the case if it chooses to do so.

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[4] Petitioner suggests that the Second Circuit in *United States ex rel. Glinton v. Denno*, 339 F.2d 872 (2d Cir. 1964), previously upheld the pretextual use of the material witness statute. Pet. 27-28. But, in *Glinton*, the police *were* seeking the individual's testimony. 339 F.2d at 873 (material witness not held as a "ruse" to extract confession from him); *id.* at 875 (noting that individual "was certainly an important witness"). In any event, the Second Circuit itself clearly does not believe that it has ever sanctioned the government's position. As noted above, the Second Circuit in *Awadallah* pointedly stated that the government could not use the statute as a cover to arrest suspects. 349 F.3d at 59.

Moreover, if the Court concludes that review is warranted at a later stage of the proceedings, it would then have the benefit of a concrete factual record to sharpen (and potentially narrow) the issues. The government, for example, has argued that prosecutors seeking material witness warrants often have mixed motives and that the existence of mixed motives is not a violation of either the material witness statute or the Fourth Amendment. Pet. 28-30 (suggesting that a genuine witness may also be viewed as a potential suspect). But discovery about the nature of petitioner's policy may reveal that this is not a case involving mixed motives in the manner suggested by petitioner. Thus, insofar as this case requires the Court to draw difficult lines on the "mixed motive" issue – or any other issue – it is best resolved on a concrete factual record.

Petitioner argues, however, that the Court's immediate review is justified for two principal reasons. First, petitioner argues that immunity defenses are designed to shield government officials not only from liability, but also from the burdens of discovery, and that later review by this Court would come too late to shield him from discovery. Pet. 18-19. Yet, while the Court has made clear that officials denied immunity at the outset of a case are entitled to one layer of interlocutory appellate review in the courts of appeals, it has never to respondent's knowledge held that such officials are entitled to *this Court's* interlocutory review; otherwise this Court would be functioning as an error-correcting tribunal in every case in which immunity is denied at the

outset (even where, as here, both the district court and the court of appeals agreed that immunity was not warranted on the complaint's extensive allegations).

The district court will also be in a position to structure discovery to avoid unnecessarily burdening petitioner. *See Crawford-El v. Britton*, 523 U.S. 574, 598-600 (1998) (describing the "many options for the district judge" in structuring discovery for this purpose). And because this case involves a top-down policy decision operating throughout many levels of the Justice Department, the district court will be in a particularly good position to structure discovery in a sequenced manner, focusing initially on lower level officials.[5]

Petitioner's second argument is that immediate review is warranted because the Ninth Circuit's ruling creates uncertainty for prosecutors. According to petitioner, prosecutors operating within the Ninth Circuit will be deterred from zealously performing their duties and will invariably err on the side of caution rather than risk a civil suit. Pet. 28-30. Petitioner's speculation is exaggerated. The court of appeals took pains to ensure that the scope of its decision was narrow and not misunderstood.

For example, in response to Judge Bea's dissenting opinion, the court specifically stated that

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[5] Petitioner is of course the former Attorney General. Consequently, any discovery permitted by the district court will not interfere with the duties of a current office holder.

its decision was not intended to provide criminal defendants with a ready means of suing prosecutors simply by claiming that the purpose of the prosecution was investigative. Pet. App. 25a (emphasizing that absolute immunity is not lost merely because a prosecutor "may hope, eventually, that the petty crook will implicate his boss" if he is charged and prosecuted).

And with respect to material witness warrants (which in any event are rarely sought by prosecutors), the court of appeals tethered its ruling closely to the allegations of the complaint. *See* Pet. App. 25a-26a ("We emphasize that our holding here does not rest upon an unadorned assertion of secret, unprovable motive."); Pet. App. 27a (emphasizing the "objective indicia" that the material witness statute was used as a pretext to arrest suspects); *see generally* Pet. App. 26a-27a. [6]

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[6] Among other things, the court of appeals emphasized that "Al-Kidd's arrest was sought a month *after* Al-Hussayen was indicted, and more than a year before trial began, temporally distant from the time any testimony would have been needed"; that the "FBI had previously investigated and interviewed al-Kidd, but had never suggested, let alone demanded, that he appear as a witness"; that the "FBI conducted lengthy interrogations with al-Kidd while in custody, including about matters apparently unrelated to Al-Hussayen's alleged visa violations"; and that "Al-Kidd *never actually* testified for the prosecution in Al-Hussayen's or any other case, despite his assurances that he would be willing to do so." Pet. App. 26a-27a (emphasis in original).

As the court of appeals stressed, the complaint alleged that petitioner created a *nationwide policy of deliberately misusing* the material statute as a cover to detain and investigate suspects. Nothing in the Ninth Circuit's opinion remotely suggests that a line prosecutor is now vulnerable when seeking a material witness warrant to obtain genuinely needed testimony from a recalcitrant witness.

Petitioner suggests that many of the analytical lines drawn by the Ninth Circuit lack a principled basis. *See, e.g.*, Pet. 20. But, for present purposes, the relevant point is that the court of appeals *did* draw those lines, thereby making clear that the type of lawsuits hypothesized by petitioner will not be permitted to go forward under the ruling in this case.

In short, there is no circuit conflict and the Court will have another opportunity to review this case should petitioner be found liable. There is no pressing need for this Court's review – especially without the benefit of a concrete factual record to narrow and sharpen the issues. And the fact-bound nature of the unique allegations in this case make this petition a poor vehicle to consider issues regarding the use of the material witness statute in routine criminal justice matters.

II. THE NINTH CIRCUIT'S DECISION WAS CORRECT.

A. The Court of Appeals Correctly Held that Petitioner Is Not Entitled to Absolute Immunity.

Absolute immunity is an extraordinary remedy because it shields even gross violations of clearly established constitutional rights. The Court has thus been "quite sparing" in affording prosecutors complete immunity from civil suit. *Burns v. Reed*, 500 U.S. 478, 487 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)).

The "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *see Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). Rather, courts must first look to common-law history to determine whether a tradition of immunity exists, and if so, whether affording complete immunity is nonetheless unwarranted in light of considerations of public policy. *See Burns*, 500 U.S. at 497 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that, under the Court's absolute immunity test, a tradition of immunity is a "*necessary*" but not a "*sufficient* condition") (emphasis in original). In doing so, the courts must "examine 'the nature of the *function performed*, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (citation omitted) (emphasis added).

Under this functional approach, prosecutors have consistently been denied absolute immunity where they are engaging in police-type functions that are "investigative in character." *Buckley*, 509 U.S. at 274; *see Kalina*, 522 U.S. at 129-31 (denying absolute immunity where prosecutor submitted an affidavit attesting to facts); *Burns*, 500 U.S. at 482, 496 (denying absolute immunity where prosecutor advised police that they had probable cause to engage in the search).

The Ninth Circuit carefully applied the Court's functional test. Under that test, it correctly held that "when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another's trial," the prosecutor is not entitled to absolute immunity. Pet. App. 25a.

Petitioner contends, however, that the court of appeals erred by looking at the reasons underlying the material witness policy. Pet. 15-18. But, because "[m]any tools and tactics available to prosecutors can serve either an investigatory or advocacy-related function," Pet. App. 24a, the approach followed by the court of appeals is fully consistent with this Court's decisions. *See, e.g.*, *Buckley*, 509 U.S. at 274-75 (conducting a "careful examination of the allegations" in the complaint to determine whether the prosecutors' "mission" and "immediate purpose" at the time they reviewed the evidence and witnesses were "investigative in character"); *id.* at 289 (Kennedy, J., concurring in part and dissenting in

part) (applying the functional approach and observing that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions. . . . The conduct is the same but the functions distinct.").

The court of appeals thus explained that the "functional" test "has necessarily required us to look beyond the labels a prosecutor attaches to his or her actions and examine their underlying ends." Pet. App. 23a (discussing *Buckley*). Indeed, as the court of appeals further observed, petitioner's approach "would convert the Supreme Court's functional approach into a formalistic taxonomy of acts that are inherently either prosecutorial or investigative, regardless of what each act is really serving to accomplish." Pet. App. 23a-24a.

Although some courts have granted prosecutors absolute immunity for material witness warrants, *see, e.g.*, *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978), in those cases there was no allegation that the prosecutor was seeking to use the material witness laws to investigate the witness for possible criminal wrongdoing, *i.e.*, engaging in functions typically carried out by law enforcement. *See* Pet. App. 18a-19a, 22a (discussing cases).[7]

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[7] Petitioner also relies on cases in which courts have granted absolute immunity even where the prosecutor's motives may have been racist, political or otherwise egregious. *See* Pet. 16-17. Here, however, the court of appeals did not hold that the Court may look at the motive behind prosecutorial acts, but

In sum, the court of appeals faithfully applied this Court's functional test and properly declined to shield petitioner's policy from all constitutional scrutiny. In doing so, the court of appeals did not restrict the use of the material witness statute to detain recalcitrant witnesses for the purpose of testifying at criminal trials, let alone the daily work of prosecutors outside of the material witness context.

B. The Ninth Circuit Correctly Held that Petitioner Was Not Entitled to Qualified Immunity.

The Ninth Circuit correctly held that petitioner's policy violated Mr. al-Kidd's clearly established Fourth Amendment rights. Moreover, the court's qualified immunity ruling, like its ruling on absolute immunity, was narrowly focused and does not limit the day-to-day conduct of prosecutors.

1. The arrest of a material witness is unquestionably a seizure within the Fourth Amendment and traditionally a seizure must be justified by probable cause. And as this Court has repeatedly explained, the standard definition of probable cause is a "reasonable ground for belief of guilt." Pet. App. 34a (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)); *id.* at 32a-34a (citing additional cases).

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rather, whether those acts were prosecutorial in the first place. Pet. App. 19a.

The material witness statute is an exception to that rule: it authorizes an arrest without reason to believe the individual has violated the law. Thus, insofar as the statute is constitutional, it is only because the objective of the arrest is not to investigate and/or prosecute the individual, but to secure testimony for someone else's criminal proceeding. The court of appeals was therefore correct in concluding that Mr. al-Kidd's arrest was unlawful to the extent its objective was to detain and investigate *him* — rather than to secure testimony for the Al-Hussayen trial.

Petitioner contends that the court of appeals erred by examining the purpose of the arrest, citing *Whren v. United States*, 517 U.S. 806 (1996), for the proposition that subjective motives are irrelevant under the Fourth Amendment. Pet. 21. But, as the Ninth Circuit explained, *Whren* (unlike the arrest of an innocent witness) involved probable cause that the arrestee had *violated the law*. Pet. App. 32a ("*Whren* rejected only the proposition that 'ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to *believe that a violation of law has occurred*.'") (quoting *Whren*, 517 U.S. at 811; emphasis added by Ninth Circuit).

The court of appeals further stressed that this case involves a *policy*. As the court of appeals properly recognized, the Court has declined to apply *Whren* in such cases and has looked to the "programmatic purpose" behind a policy. Pet. App.

39a ("we are not probing into the minds of individual officers at the scene; instead, we are inquiring into the programmatic purpose of a general policy"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45-47 (2000) (distinguishing *Whren* and examining "available evidence" in finding that checkpoint was used for impermissible general law enforcement purposes); *Ferguson v. City of Charleston*, 532 U.S. 67, 81-82 (2001); *see Whren*, 517 U.S. at 813 (refusing to examine subjective motivations of individual police officers).

Petitioner nonetheless contends that *Whren* should still control this case because a material witness warrant is issued by a magistrate on an individualized showing that the witness has material information that would otherwise be impracticable to secure. Pet. 22-23. But, as the Ninth Circuit stressed, the individualized showing necessary to obtain a material witness warrant bears no relation to the traditional probable-cause showing necessary for an arrest of a suspect. Pet. App. 32a-39a. And it has long been settled that a warrant issued by a magistrate may still violate the Fourth Amendment, and thus subject those who sought the warrant to civil liability. *See Malley v. Briggs*, 475 U.S. 335, 345-46 (1986). Moreover, magistrates will rarely if ever be able to discover a *hidden* government motive, much less a nationwide policy reflecting a programmatic purpose, at the time they issue the warrant (especially given that it is an *ex parte* proceeding). *Cf. Franks v. Delaware*, 438 U.S. 154 (1978).

Petitioner also contends that this case is different from *Edmond* because the "program" at issue here is the material witness statute, whereas in *Edmond* it was a "police department practice." Pet. 23. But the program at issue here is not the statute, but a policy that unconstitutionally perverts the intended use of the statute.

Indeed, the Ninth Circuit did not hold (contrary to petitioner's suggestion, Pet. 24-25) that the statute was unconstitutional, either on its face or as applied to Mr. al-Kidd. Rather, it held that *both* the Fourth Amendment and the statute itself prohibit the government from using its powers to arrest an innocent witness as a pretext for detaining and investigating suspects. Pet. App. 40a (stressing that the statute does not permit the arrest and detention of suspects "*for the purpose of criminal investigation*") (emphasis in Ninth Circuit opinion); *id.* ("Our holding does nothing to curb the use of the material witness statute for its stated purpose."); Pet. App. 113a (Smith, J., concurring in the denial of rehearing en banc) (emphasizing that the court did not hold that the statute is unconstitutional on its face or as applied to Mr. al-Kidd, but rather, that both the Fourth Amendment *and* the statute prohibit pretextual arrests of suspects, and are therefore coterminous in that regard).[8]

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[8] Thus, contrary to petitioner's statements (*see, e.g.*, Pet. (I), 7, 13, 20, 24, 29), the warrant in this case was not valid. Even assuming that the material witness statute's materiality and impracticability requirements were met, the position of

2. The court of appeals also properly concluded that "al-Kidd's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established in 2003." Pet. App. 46a. As the court of appeals explained, although "no federal appellate court had yet squarely held that the federal material witness statute satisfied the requirements of the Fourth Amendment . . . [w]hat *obiter dicta* existed [in 2003] on material witness detention . . . clearly linked its justification only to the state's overriding need to compel testimony in criminal cases." Pet. App. 42a.[9]

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respondent and the Ninth Circuit is that both the Fourth Amendment and the statute prohibit a material witness arrest for the purpose of investigating a suspect, rather than for securing testimony. *See also supra* at i (counter-statement of questions presented).

[9] The court of appeals also observed that circuit decisions directly addressing petitioner's post September 11 policy would have been "almost impossible" by 2003 given the lengthy appellate process. Pet. App. 46a n.22. That is especially so where the government took steps to keep secret the nature of the policy. FAC ¶ 135. The court further noted that it was "unsurprising" that there were not more "published cases directly on point" given the extraordinary nature of petitioner's policy. Pet. App. 41a; *cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances"); *Groh v. Ramirez*, 540 U.S. 551, 565 & n.9 (2004) (finding law clearly established despite dissent by two Justices that there was no Fourth Amendment violation at all); *see id.* at 578 (Thomas, J., dissenting).

There was thus no basis for believing that the government could de-link its extraordinary power under the statute from the purpose of the statute – to secure testimony. And, as already noted, no court to address that question after September 11 has concluded that the pretextual use of the statute is permissible. *See supra* Section I; *Awadallah*, 349 F.3d at 59 ("it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established").

In short, petitioner's deliberate decision to authorize the pretextual arrest of witnesses was clearly unconstitutional at the time of Mr. al-Kidd's arrest. Thus, the district court and court of appeals properly denied petitioner immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 2010

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www.recordpress.com

REPLY BRIEF

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(4)

Supreme Court, U.S.
FILED
SEP 29 2010
OFFICE OF THE CLERK

No. 10-98

In the Supreme Court of the United States

JOHN D. ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

No. 10-98

JOHN D. ASHCROFT, PETITIONER

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ABDULLAH AL-KIDD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The court of appeals erred in holding that a former Attorney General of the United States could be subject to burdensome litigation based on the conduct of his subordinates in seeking and obtaining a warrant for respondent's arrest as a material witness. Its decision conflicts with decisions of this Court and other courts of appeals, effectively invalidates an Act of Congress, and, if permitted to stand, would severely damage important law-enforcement interests. This Court's review is therefore warranted.

Respondent contends (Br. in Opp. 23) that this Court's review is unnecessary because petitioner can seek review at a later time if he is ultimately found liable. That argument overlooks that one of the key purposes of immunity is to protect against the burdens of litigation, including discovery and trial. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (noting that qualified immunity is an "*immunity from suit*"); *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976). More-

over, the consequences of at least three aspects of the decision below are sufficiently serious as to call for immediate correction by this Court.

First, the court of appeals denied petitioner absolute immunity from claims that he instructed his subordinates to seek a material witness warrant. In the court's view, petitioner's absolute immunity was defeated because respondent alleged that the "immediate purpose" of the warrant was "investigative." Respondent attempts to defend the court's reasoning on this issue, but his efforts are unsuccessful. The "immediate purpose" test has no support in precedent or logic; it conflicts with the decisions of other courts of appeals; and it threatens to undermine the policy objectives of the absolute-immunity doctrine by exposing prosecutors to suit when they exercise core advocacy functions.

Second, the court of appeals held that the Fourth Amendment prohibits the use of valid material witness warrants as a "pretext" for further investigation of a suspect. That holding is inconsistent with this Court's precedent recognizing that an officer's subjective intent is irrelevant to the validity of an arrest. It also leads to the conclusion that the material witness statute, 18 U.S.C. 3144, is unconstitutional as applied to this case. And it would severely limit prosecutors' ability and willingness to use the material witness statute in circumstances that frequently arise. Respondent argues that the court did not invalidate the statute but merely construed it not to apply here, but that interpretation finds no support in the court's opinion. Nor is there any basis for respondent's argument that the court's unprecedented decision was sufficiently "clearly established" to impose personal liability upon petitioner.

Third, the court of appeals ruled that the former Attorney General may be held responsible for alleged misstatements in an affidavit filed by subordinate officials. That

conclusion rests on a theory of vast supervisory liability that is directly contrary to this Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and respondent no longer attempts to defend it. Instead, he promises (Br. in Opp. i) to abandon his claims based on that theory in any further proceedings. That erroneous aspect of the decision below is nevertheless significant and should not be allowed to stand. Respondent's abandonment of his claims has mooted that issue, and therefore, even if the Court does not grant plenary review, it should vacate that aspect of the court of appeals' decision. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

A. The Court Of Appeals Erred In Holding That Petitioner Is Not Entitled To Absolute Immunity

As explained in the petition (at 14-20), the court of appeals erred in denying petitioner absolute immunity for respondent's claim that he implemented a policy of using the material witness statute to investigate or preventatively detain terrorism suspects. If allowed to stand, that holding would frustrate the purposes of prosecutorial immunity and discourage the vigorous exercise of important governmental functions. Respondent's efforts to defend the court's reasoning are unavailing.

1. Respondent does not dispute that absolute immunity operates when an official, including the Attorney General, performs actions that are "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). Nor does he dispute that seeking a material witness warrant is just such an action. Indeed, as respondent acknowledges (Br. in Opp. 30), courts have recognized that absolute immunity applies when a prosecutor seeks a material witness warrant. See, *e.g.*, *Betts* v. *Richard*, 726 F.2d 79, 81 (2d Cir. 1984); *Daniels* v. *Kieser*, 586

F.2d 64, 68-69 (7th Cir. 1978), cert. denied, 441 U.S. 931 (1979).

Instead, respondent attempts to defend the court of appeals' conclusion that while absolute immunity generally applies to the decision to seek a material witness warrant, such immunity is unavailable if a plaintiff alleges that the prosecutor's "immediate purpose" is "to investigate or preemptively detain a suspect." Pet. App. 25a. He asserts (Br. in Opp. 29) that the court of appeals merely applied "the Court's functional test" for determining when an activity is prosecutorial and therefore covered by absolute immunity. But that is not what the court of appeals actually did. Rather, it replaced the simple legal inquiry into the nature of the function being performed with a complicated factual inquiry into the subjective motives of the prosecutor. Under its rule, courts must examine the prosecutor's motive in order to determine whether the act in question is "prosecutorial." See Pet. App. 25a. Respondent's contention to the contrary is based upon an artificial distinction between the supposed "purpose" behind the act (which respondent believes can be considered) and the "motive" behind the act (which cannot). But neither respondent nor the court of appeals offered any basis for drawing that distinction.

Respondent repeats the error of the court of appeals (Pet. App. 19a-20a) in claiming (Br. in Opp. 29) to find support for the court's "immediate purpose" test in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993). The Court in *Buckley* did not endorse evaluation of the *prosecutor's* immediate purpose. Instead, that case involved the question whether a prosecutor's analysis of crime-scene evidence—normally an investigatory function—was nonetheless prosecutorial. This Court held that the subsequent convening of a grand jury did not make the prosecutor's alleged fabrication of evidence a prosecutorial act. The Court noted that the prose-

cutor's conduct occurred before the grand jury had convened, and that the "immediate purpose" *of the grand jury* was to investigate the crime and not to return an incitement against the suspect. *Id.* at 275. Nothing in *Buckley* suggests that an individual prosecutor's "immediate purpose" for performing an act that is unquestionably prosecutorial in nature can convert the act into an investigatory one.

2. As explained in the petition (at 19-20), the decision below would permit mere allegations of a prosecutor's improper purpose to defeat absolute immunity. Because bad motive is "easy to allege and hard to disprove," *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (internal quotation marks omitted), the court of appeals' holding would undermine the protection of absolute immunity by subjecting prosecutors to burdensome discovery of their motives. Respondent asserts (Br. in Opp. 25) that the uncertainty for prosecutors created by the court's opinion is based upon "exaggerated" speculation, but in fact the court's immediate-purpose standard leaves prosecutors subject to potential claims of improper purpose for every act they take. For example, as noted in the petition (at 20), a prosecutor may face accusations that the real reason he charged a defendant with a crime was to induce his cooperation in an ongoing investigation, and not to actually secure a conviction. Respondent's brief echoes the court of appeals' response to such legitimate fears, suggesting that somehow the prosecutor's "immediate purpose" in that situation is not investigatory. Respondent all but concedes (Br. in Opp. 27) that this reasoning lacks any logical foundation, arguing that even if "many of the analytical lines drawn by the Ninth Circuit lack a principled basis," the "relevant point is that the court of appeals *did* draw those lines." But precisely because those lines are unsupported by any principle, they will provide no reassurance to officials who face the prospect of litigation

over the exercise of routine prosecutorial functions that they undertake each day.

Before this case, no court had adopted the approach of the court below. Indeed, contrary to respondent's suggestion that there is no circuit conflict (Br. in Opp. 22), at least two other courts of appeals have expressly rejected the proposition that a prosecutor's intent is relevant to absolute immunity analysis. See, *e.g.*, *Bernard* v. *County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) (The "fact that improper motives may influence" a prosecutor's exercise of discretion "cannot deprive him of absolute immunity."); *Austin Mun. Sec., Inc.* v. *National Ass'n of Sec. Dealers*, 757 F.2d 676, 685 (5th Cir. 1985) ("[T]he intent with which * * * defendants operate is irrelevant to the absolute immunity issue."). The conflict with those decisions warrants this Court's review.

B. The Court Of Appeals Erred In Holding That Petitioner Is Not Entitled To Qualified Immunity

The court of appeals further erred in holding that petitioner is not entitled to qualified immunity, and its decision effectively invalidates the material witness statute. See William P. Barr, et al. Amicus Br. 18-21. Respondent attempts both to defend the decision and to minimize its significance, but his arguments are not persuasive.

1. Like the court of appeals, respondent asserts (Br. in Opp. 32) that the arrest of a material witness comports with the Fourth Amendment only if the arrest has a particular objective: "not to investigate and/or prosecute the individual, but to secure testimony for someone else's criminal proceeding." That assertion is directly contrary to this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996), which made clear that the Fourth Amendment establishes an objective standard under which an officer's motives are

irrelevant. See *id.* at 813 ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.").

Respondent attempts (Br. in Opp. 32) to distinguish *Whren* on the ground that the case involved an arrest based on probable cause to believe that the arrestee had committed a criminal offense. That argument overlooks that respondent's detention was also based on an individualized determination of probable cause—that is, a finding by a neutral magistrate that there was probable cause that respondent had information important to an ongoing criminal proceeding.

Similarly flawed is respondent's argument (Br. in Opp. 32-33) that, under *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000)—a case involving vehicle checkpoints—a court must examine the "programmatic purpose" of the policy underlying his detention. As explained in the petition (at 22-23), *Edmond* applies only to seizures that, unlike the one at issue in this case, lack any individualized basis. Moreover, the Court in *Edmond* cautioned that an inquiry into programmatic purpose "is not an invitation to probe the minds of individual officers acting at the scene," 531 U.S. at 48—precisely what the court of appeals did here.

2. In holding that the Fourth Amendment prohibited an arrest that the material witness statute permitted, the court of appeals effectively invalidated the statute as applied to the circumstances of this case. Respondent attempts (Br. in Opp. 34) to resist that conclusion, arguing that the court of appeals actually construed the statute to prohibit detention "as a pretext for * * * investigating suspects." Although Judge Smith expressed that view in his concurrence in the denial of rehearing en banc, Pet. App. 113a-114a, the panel did not. Instead, it viewed the only statutory claim in the case as one based on false statements in the warrant affida-

vit. *Id.* at 47a-48a. The court's decision that respondent's detention was improper was expressly based on the Fourth Amendment. *Id.* at 40a ("To use a material witness statue pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment.").

Respondent also contends (Br. in Opp. 22) that the Second Circuit has endorsed his interpretation of the material witness statute. He relies on *United States* v. *Awadallah*, 349 F.3d 42 (2003), cert. denied, 543 U.S. 1056 (2005), in which the court stated that it would be "improper" to use the statute for the purpose of "the detention of persons suspected of criminal activity for which probable cause has not yet been established." *Id.* at 59. That suggestion was dicta, and in any event the court did not state that such a purpose would invalidate an otherwise lawful use of the statute. To the contrary, the Second Circuit has previously rejected just such an argument. *United States ex rel. Glinton* v. *Denno*, 339 F.2d 872, 875 (1964), cert. denied, 381 U.S. 929 (1965). Nothing in *Awadallah* took issue with *Glinton*.

3. Even if the court of appeals were correct that the Fourth Amendment prohibited the execution of a material witness warrant when a prosecutor acted with investigative intent, the court erred in denying qualified immunity because that rule was not clearly established at the time of respondent's arrest. The court's error will increase the harmful effects of the decision below by discouraging prosecutors from using the material witness statute in any case where they suspect that the witness may also have committed a crime.

The court of appeals acknowledged—and respondent does not dispute (Br. in Opp. 35)—that as of the time of respondent's arrest, no case had "squarely confronted the question of whether misuse of the material witness statute

to investigate suspects violates the Constitution." Pet. App. 41a. Respondent argues (Br. in Opp. 36) that "[t]here was * * * no basis for believing" that the use of the material witness statute in this case was lawful. Even if that observation were accurate—which it is not—respondent's argument rests on an inversion of the appropriate qualified-immunity inquiry. As this Court has made clear, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was *unlawful* in the situation he confronted." *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)) (emphasis added). Like the court of appeals, respondent has not come close to demonstrating that this demanding standard was satisfied.

C. The Court Of Appeals Adopted Pleading Standards That Conflict With *Iqbal*

As demonstrated in the petition (at 30-33), the court of appeals also erred in concluding that petitioner, the former Attorney General, can be held responsible for alleged false statements and omissions in the affidavit submitted by subordinate officials in support of the warrant to arrest respondent. The court's decision was based on a theory of supervisory liability that is directly contrary to the holding of *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). Respondent makes no effort to defend the court of appeals' holding in this regard, nor does he dispute that the decision warrants review because it conflicts with *Iqbal*. Instead, he declares (Br. in Opp. i) that he "will not pursue the claims in Question 3" before this Court and "will abandon the claim in Question 3 in any further proceedings in the district court or Ninth Circuit."

Respondent's abandonment of his claim provides no basis for denying review on the other questions presented. If the Court does not grant plenary review to consider those questions, however, then because respondent has mooted the supervisory-liability issue, the proper course would be to vacate that aspect of the court of appeals' decision. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That course would be particularly appropriate here because courts both inside and outside the Ninth Circuit have relied upon the decision below to allow claims to proceed based upon allegations that high-ranking government officials merely acquiesced in alleged constitutional violations. See, *e.g.*, *Vance* v. *Rumsfeld*, 694 F. Supp. 2d 957, 964-965 (N.D. Ill. 2010) (relying upon the decision below to hold that allegations that former Secretary of Defense was aware of abuses and acquiesced in them were sufficient to state a claim), appeal pending, No. 10-1687 (7th Cir.); *Collins* v. *Brewer*, No. 2:09-CV-02402, 2010 WL 2926131, at *10 (D. Ariz. July 23, 2010) (citing the decision below for the proposition that "direct, personal participation is not necessary to establish liability for a constitutional violation"). The "happenstance" of respondent's abandonment of the issue should not deprive the government of the ability to seek correction of the court's judgment. *Munsingwear*, 340 U.S. at 40.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. If the Court does not grant plenary review, it should vacate the portion of the decision below addressing the third question presented. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Respectfully submitted.

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SEPTEMBER 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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OFFICE OF THE CLERK

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Petitioner,

v.

ABDULLAH AL-KIDD,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF OF WILLIAM P. BARR, BENJAMIN R. CIVILETTI, EDWIN MEESE III, MICHAEL B. MUKASEY, DICK THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Date: August 18, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Respondent was arrested on a material witness warrant issued by a federal magistrate judge under 18 U.S.C. § 3144 in connection with a pending prosecution. He later filed a *Bivens* action against Petitioner, the former Attorney General of the United States, seeking damages for his arrest. Respondent alleged that his arrest resulted from a policy implemented by the former Attorney General of using the material witness statute as a "pretext" to investigate and preventively detain terrorism suspects. In addition, Respondent alleged that the affidavit submitted in support of the warrant for his arrest contained false statements. The Petition presents three questions; *amici curiae* address the following two questions only:

1. Whether the court of appeals erred in denying Petitioner qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of Respondent's arrest.

2. Whether the former Attorney General may be held liable for the alleged false statements in the affidavit supporting the material witness warrant, even though the complaint does not allege that he either participated in the preparation of the affidavit or implemented any policy encouraging such alleged misconduct.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are five former Attorneys General of the United States and a public interest law firm.[1] They believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. They are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of constitutional claims.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Benjamin R. Civiletti served as Attorney General of the United States from 1979 to 1981. He also served as Assistant Attorney General for the Criminal Division from 1977 to 1978 and as Deputy Attorney General from 1978 to 1979.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondent Al-Kidd with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a federal judge on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It regularly appears in this and other federal courts to support the litigation immunity rights of public officials.

STATEMENT OF THE CASE

The material witness statute, 18 U.S.C. § 3144, permits a judicial officer to order an individual's arrest, provided that a party's affidavit makes two showings: (1) the person's testimony is material to a criminal proceeding; and (2) it may become impractical to secure the person's presence at the criminal proceeding by subpoena.[2]

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[2] Section 3144 provides in relevant part:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding,

Respondent Abdullah Al-Kidd is an American citizen who was detained for a period of 15 days in March 2003 pursuant to the material witness statute. As the court of appeals recognized, Al-Kidd's constitutional claim acknowledges that an impartial magistrate judge determined that prosecutors made both of the requisite showings under § 3144. Pet. App. 14a (stating that the complaint concedes that Al-Kidd's circumstances "may have met the facial statutory requirements of § 3144."). Indeed, it is largely uncontested that: (1) Al-Kidd had numerous ties to Omar Al-Hussayen, a citizen of Saudi Arabia who, at the time of Al-Kidd's arrest, was under indictment for multiple false statements and visa-fraud offenses; and (2) Al-Kidd was arrested at Dulles International Airport as he was preparing to fly to Saudi Arabia for an extended period of study, and thus federal prosecutors might have had difficulty procuring his presence at Al-Hussayen's trial through use of a subpoena.

In March 2005, Al-Kidd filed suit against numerous federal government officials, including Petitioner John Ashcroft (who was serving as Attorney General at the time of Al-Kidd's arrest), seeking to recover damages for alleged violation of his rights under § 3144 and the Fourth Amendment.[3] Two of Al-Kidd's

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and if it is shown that it may become impractical to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.

[3] Other defendants included FBI Director Robert Mueller, Michael Chertoff (who in March 2003 was serving as Assistant Attorney General in charge of the Justice Department's Criminal

claims are relevant to this petition.

First, Al-Kidd asserted that, in response to the September 11, 2001, terrorist attacks, Ashcroft and the Justice Department developed a policy of aggressive, "pretextual" use of the material witness statute in connection with terrorism investigations. The policy allegedly entailed using the statute to investigate and detain terrorism suspects whom the government lacked probable cause to charge criminally. While those to be arrested may well have met § 3144's prerequisites, the alleged policy authorized arrests even where prosecutors had little thought of calling the individual as a witness in ongoing proceedings and the primary motivation for the arrest was to investigate and detain the individual. Al-Kidd alleged that his arrest entailed just such "pretextual" use of the material witness statute. He alleged that his arrest violated the Fourth Amendment because it was primarily motivated by a desire to investigate him as a terrorism suspect, even though prosecutors lacked probable cause to believe that he had committed a crime.

Second, Al-Kidd asserted that FBI agents Scott Mace and Michael Gneckow included deliberately false statements in the affidavit submitted in support of the request for the material witness arrest warrant, and deliberately omitted material information. Al-Kidd asserted that many of the defendants, including Ashcroft, should be held liable for the allegedly false statements and material omissions. He asserted that

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Division), and the two FBI agents who prepared the affidavit in support of the warrant application.

the defendants' actions violated his Fourth Amendment rights (as well as his rights under § 3144) not to be detained on a warrant based on an agent's deliberate or reckless misrepresentations or omissions.[4]

The individual defendants filed motions to dismiss the complaint. All of the motions were denied. Only Ashcroft filed an interlocutory appeal from the denial; the appeal asserted that dismissal was warranted on grounds of absolute and qualified immunity.

A divided Ninth Circuit panel affirmed. Pet. App. 1a-64a. The appeals court held that the complaint concerned Ashcroft's performance of an investigatory function and that absolute immunity claims could be asserted by prosecutors only when they engage in activities associated with the judicial phase of the criminal process, not when (as alleged here) they are undertaking investigations. *Id.* at 14a-27a.

The appeals court also rejected Ashcroft's assertion that the qualified immunity doctrine required dismissal of the Fourth Amendment "pretextual use" claim. *Id.* at 30a-47a. The court held that Ashcroft could be subject to Fourth Amendment liability under a theory that he "set in motion a policy and/or practice" that caused Justice Department personnel to arrest individuals under the material witness statute where

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[4] Al-Kidd also asserted that the conditions of his confinement violated his constitutional rights. The Ninth Circuit held that the conditions-of-confinement claim should be dismissed with respect to Ashcroft because the complaint did not adequately plead his direct involvement in the issue. Pet. App. 59a. This third claim is not at issue here.

their real purpose in doing so was to hold the individuals preventively or to investigate further. *Id.* at 30a. The court cited *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), for the proposition that a government program violates the Fourth Amendment if: (1) its primary purpose is to conduct criminal investigations; and (2) it entails the seizure of individuals without probable cause to believe that they have committed a criminal offense. *Id.* at 36a-39a. .

The appeals court held that qualified immunity was unwarranted because the unconstitutionality of Ashcroft's actions was "clearly established" at the time of Al-Kidd's arrest. Pet. App. 40a-47a. Although it conceded that in March 2003 "no case had squarely confronted" the constitutionality of "pretextual" use of the material witness statute, *id.* at 41a, the court held that *Edmond* and similar cases "put Ashcroft on notice" that. "investigatory programmatic purpose would invalidate a scheme of searches and seizures without probable case." *Id.* at 43s.

The appeals court also rejected Ashcroft's assertion that he was entitled to dismissal of the deliberate-false-statement claim. *Id.* at 47a-56a. The court held that Al-Kidd need not allege that Ashcroft "actually instructed" his subordinates to submit an affidavit containing false statements. *Id.* at 52. Rather, the complaint was sufficient to withstand a motion to dismiss because it alleged facts showing "Ashcroft's knowing failure to act in the light of even unauthorized abuses." *Id.* at 52a.

Judge Bea dissented from all aspects of the majority decision discussed above. *Id.* at 64a-105a. He

asserted that Ashcroft was entitled to qualified immunity on the "pretextual use" claim because: (1) under the Fourth Amendment, an arresting officer's "subjective intentions are irrelevant so long as the officer's conduct is objectively justified," and Al-Kidd did not dispute that the objective criteria set forth in § 3144 were satisfied in his case, *id.* at 70a-71a; and (2) even if Al-Kidd's arrest on a pretextual material witness warrant violated his Fourth Amendment rights, such rights were not "clearly established" in March 2003. *Id.* at 84a. He also asserted that the Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), barred imposing liability on Ashcroft on the basis of his subordinates' allegedly false statements, in the absence of allegations that Ashcroft acted affirmatively to encourage such false statements. *Id.* at 86a-92a. He also disagreed with most aspects of the majority's holding that Ashcroft was not entitled to absolute immunity. *Id.* at 92a-104a.

In March 2010, the appeals court denied Ashcroft's petition for rehearing en banc. *Id.* at 106a. Judge O'Scannlain, joined by seven other judges, issued an opinion dissenting from the denial. *Id.* at 122a-131a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that

"'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below calls into question the ability of high-level Executive Branch officials ever to prevail on a qualified immunity defense raised at the pleadings stage of a *Bivens* action. As former senior Executive Branch officials, the individual *amici curiae* are concerned about the disruptive effects of such discovery, and they fear that the decision below may deter Attorneys General from exercising the full range of their lawful authority to protect the security of the United States. Review is warranted to determine whether such disruptions are required under the terms of the qualified immunity doctrine, particularly when (as here) the challenged actions involve sensitive national security issues.

Particularly troubling is the Ninth Circuit's holding that the unconstitutionality of Ashcroft's conduct was "clearly established" at the time of Al-Kidd's arrest in March 2003. The appeals court conceded that it could point to no reported decision holding that an objectively valid material witness warrant could nonetheless violate the Fourth Amendment because the prosecutor's primary motivation was preventive detention or to investigate the defendant. Its "clearly established" conclusion was based on little more than a generalized assertion that Ashcroft should have known in 2003 that the Fourth Amendment prohibits unreasonable searches and seizures. Pet. App. 43a ("[T]he history and purposes of the Fourth Amendment were known well before 2003.") But if courts permit the "clearly established" requirement to be viewed at that high level of generality, the qualified immunity doctrine will be robbed of much of

its vitality. As Judge O'Scannlain stated in his dissent, "If [awareness of Fourth Amendment history] is sufficient clearly to establish how the Fourth Amendment applies in a particular setting, then how can *any* Fourth Amendment rule ever *not* be 'clearly established?'" *Id.* at 128a (emphasis in original).

Review is also warranted because the appeals court decision effectively declares the material witness statute unconstitutional, at least as applied to Al-Kidd. The material witness statute is an extremely important tool in enforcing the criminal law. The appeals court decision inevitably will cause prosecutors to be more reluctant to make use of the statute out of fear that such use could lead to a lawsuit requesting a monetary judgment against the prosecutors in their personal capacities. Ironically, reduced use of the material witness statute could work to the detriment of those under investigation; § 3144 includes provisions that afford far greater procedural protections to individuals than do alternative tools available to federal authorities.

Review is also warranted of the appeals court's decision to allow Al-Kidd to proceed with his deliberate-false-statement claim against Ashcroft. That claim is based on a supervisory liability theory of the sort rejected by this Court in *Iqbal*. There is no allegation that Ashcroft had any specific knowledge of Al-Kidd or the alleged decision of an FBI agent to include false statements in his affidavit. In allowing the claim to go forward, the Ninth Circuit relied on allegations that Ashcroft was aware of abuses of the material witness statute and knowingly "fail[ed] to act." Pet. App. 52a. But *Iqbal* held squarely that a government supervisory employee "do[es] not answer for the torts of [his]

servants" in a *Bivens* action but rather "is only liable for his or her own misconduct." *Iqbal*, 129 S. Ct. at 1949. Establishing such misconduct entails showing a "purpose" to violate constitutional rights, not mere "knowledge" of others' violations. *Id.* Moreover, allegations that Ashcroft encouraged "pretextual" use of the material witness statute cannot serve as a predicate for deliberate-false-statement liability. Even if one accepts the Ninth Circuit's conclusion that "pretextual" use of § 3144 violates the Fourth Amendment, it is simply not plausible to assert that encouraging "pretextual" use causes FBI agents to include false statements in their material witness affidavits.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW THREATENS THE ABILITY OF FEDERAL OFFICIALS TO PREVAIL AT THE PLEADINGS STAGE ON A QUALIFIED IMMUNITY DEFENSE

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such

> discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow v. Fitzgerald, 457 U.S. 800, 817 n.29.

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety. The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit.

Mitchell, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

Events proved Justice Stevens prescient. Lawsuits seeking damages from senior Executive Branch officials for actions they took regarding national security matters proliferated throughout the administrations of Presidents Bill Clinton and George W. Bush. In many instances, federal courts denied motions urging dismissal based on qualified immunity claims, and the officials involved were required to devote years to fending off the claims for damages. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003) (suit against Attorney General arising from execution of an arrest warrant for six-year-old Elian Gonzalez); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2008) (suit against Secretary of Defense regarding treatment of enemy combatants held at Guantanamo Bay, Cuba), *cert. denied*, 130 S. Ct. 1030 (2010); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010) (similar claims by individuals detained in Iraq); *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) (suit against Attorney General and FBI Director regarding treatment of individuals held for immigration violations in connection with 9/11 investigation); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (suit against Attorney General, Secretary of Homeland Security, and FBI Director regarding rendition to Syria of citizen of Syria and Canada), *cert. denied*, 177 L. Ed. 2d 349 (2010). Review is warranted to provide clear guidance to the lower federal courts regarding when the qualified immunity doctrine requires early dismissal of damage claims against senior government officials.

A. The Qualified Immunity Doctrine Was Crafted to Reduce the Burden on Government Officials of Defending Against Damages Claims

In an effort to reduce the litigation burden of government officials, the Court has crafted a qualified immunity doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Mitchell*, 472 U.S. at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "insubstantial claims [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640 n.2. *See also Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

Qualified immunity shields a government official from liability in an individual capacity so long as the official has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome the defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a statutory or constitutional right; and (2) the right was clearly established at the time of the deprivation. *Saucier*, 533 U.S. at 199. Court are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). *Amici* submit that review of the second prong – whether the asserted right was "clearly

established" – is particularly warranted in this case.

B. Under the Ninth Circuit's Ruling, Virtually Every Alleged Violation Will Be Deemed "Clearly Established"

The Ninth Circuit conceded that it could point to no reported decision whose holding directly supported its conclusion: that an objectively valid material witness warrant could nonetheless violate the Fourth Amendment because the prosecutor's primary motivation was preventive detention or to investigate the defendant. In determining that it was "clearly established" that such "pretextual" use of § 3144 violated the Fourth Amendment, the appeals court could point to little more than the lengthy Fourth Amendment history of requiring the government (in most instances) to have probable cause to believe that an individual has committed a criminal offense before arresting the individual. Pet. Ap. 42a-45a.

If that history is sufficient to meet the "clearly established" requirement, then it will be exceedingly difficult for a government official to demonstrate that any Fourth Amendment rule is *not* clearly established. Indeed, it would call into question the constitutionality of the material witness statute itself, which throughout American history has been used to detain individuals who the government has no reason believe have committed a criminal offense. Moreover, this Court has recognized numerous exceptions to the general rule that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37. *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random

drug testing of student-athletes); *Treasury Employees v. von Raab*, 489 U.S. 656 (1989) (upholding random drug testing of Customs employees); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (upholding drug testing of railway employees involved in train accidents); *New York v. Burger*, 482 U.S. 691, 702-04 (1987)(upholding warrantless administrative inspections of "closely regulated" businesses); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding suspicionless seizures of motorists at highway sobriety checkpoints designed to remove drunk drivers from the road). The appeals court made no effort to explain why those decisions do not undercut its "clearly established" determination in this case.

To support its "clearly established" determination, the appeals court relied primarily on *Edmond*, which held that the Fourth Amendment prohibits a police force from randomly stopping cars at highway checkpoints for the purpose of detecting evidence of ordinary criminal wrongdoing (in that case, possession of unlawful drugs). 531 U.S. at 44. But given that the stops at issue in *Edmond* were undertaken at the sole discretion of police officers, it is difficult to discern why *Edmond* should have caused government officials to question the constitutionality of material witness arrests made pursuant to warrants issued by magistrate judges who determined that prosecutors met the objective criteria set forth in § 3144.

More importantly, *Edmond* explicitly recognized that, if a government official has a legitimate interest in detaining an individual, courts should not "look behind that interest to determine whether the government's

primary purpose is valid," and that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 531 U.S. at 45 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)). *Edmond* recognized a limited exception to that general rule: where the government adopts a "general scheme" whereby searches or seizures are undertaken without individualized suspicion, courts may examine the scheme's "programmatic purpose" to determine whether the scheme passes Fourth Amendment muster. *Id.* But Al-Kidd is not asking the courts to undertake a "programmatic" review of federal government use of the material witness statute, because he makes no claim that all government uses of the statute have been "pretextual" in nature. Rather, he asserts that use of the statute was "pretextual" *in his particular case*.

Accordingly, nothing in *Edmond* would have put government officials on notice that the Fourth Amendment authorized courts to "look behind" the decision to seek a material witness warrant for Al-Kidd, to determine whether its "primary purpose" in seeking the warrant was valid. Indeed, in *every* Fourth Amendment case in which this Court has been asked to "look behind" an objectively reasonable government action to determine whether the government action was improperly motivated, it has declined to do so. *See, e.g.*, *Whren*, 517 U.S. at 813; *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); *Scott v. United States*, 436 U.S. 128, 136 (1978) ("Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."). Under those circumstance, the Ninth Circuit's determination that case law "clearly established" that the alleged "pretextual" use of § 3144 in Al-Kidd's case violated the Fourth Amendment sharply conflicts with

this Court's qualified immunity case law. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."). Review is warranted to resolve that conflict, without regard to whether one agrees with the appeals court's ultimate determination that the Fourth Amendment prohibits "pretextual" use of the material witness statute.

The Ninth Circuit's "clearly established" determination is also problematic because it took place at such a high level of generality. It cited no decisions finding a Fourth Amendment violation under similar circumstances but rather based its "clearly established" determination on the general Fourth Amendment rule that, in most instances, a search or seizure requires individualized suspicion of wrongdoing. Pet. App. 42a-45a. But as the D.C. Circuit has pointed out:

> It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been "clearly established" in this country since 1791. Instead, courts must define the right to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Int'l Action Ctr. v. United States, 365 F.3d 20, 25 (2004) (Roberts, J.) (quoting *Anderson*, 483 U.S. at 639). Review is warranted to determine whether federal officials in 2003, based on then-existing case law, could reasonably have anticipated that their decision to arrest Al-Kidd could give rise to an award of damages against them in a Fourth Amendment lawsuit.

II. THE DECISION BELOW UNDERMINES EFFECTIVE USE OF THE MATERIAL WITNESS STATUTE

Review is also warranted because the appeals court decision effectively declares the material witness statute unconstitutional, at least as applied to Al-Kidd. Pet. App. 125a-126a (O'Scannlain, J., dissenting from denial of rehearing *en banc*). That the decision below "invalidate[s] a statute passed by the First Congress and retained by every subsequent Congress," *id.* at 126a, is by itself sufficient reason to grant review.

The importance of material witness statutes for effective law enforcement is attested by their adoption by the federal government and all 50 States. *See* Dan Stigell, *Counterterrorism and the Comparative Law of Investigative Detention*, 50 (Cambria Press, 2009) (describing material witness statute as "the most potent weapon in the U.S. counterterrorism arsenal").[5] Federal prosecutors have made extensive use of § 3144 and its predecessors for many decades; recent critics are wrong in suggesting that there has been a sharp upswing in material witness warrants in the past decade.[6]

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[5] Among the high-profile convicted terrorists who initially were held on a temporary basis as material witnesses were Terry Nichols (Oklahoma City bomber); Zacarias Moussaoui (a member of the 9/11 conspiracy); Earl James Ujaama and Mahar Hawash (Americans convicted of providing support to the Taliban), and Jose Padilla (American convicted of conspiracy to engage in terrorism overseas).

[6] Citing data from the Administrative Office of the United States Courts, a Congressional Research Service report concluded

The appeals court decision inevitably will cause prosecutors to be more reluctant to make use of the statute out of fear that such use could lead to lawsuits requesting monetary judgments against the prosecutors in their personal capacities. A recent report on anti-terrorism prosecutions succinctly summarized the dilemma regularly faced by prosecutors:

> Many of the individuals who were arrested on material witness warrants after 9/11 were likely viewed as potential suspects in addition to being material witnesses. Indeed, in most complex criminal investigations, it often is not clear whether an individual is primarily a witness or primarily a suspect; often they are potentially both. In many cases, as may well have been the fact after the 9/11 attacks, the government may suspect an individual but also want that individual's testimony if he is willing to give it.

Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts*, HUMAN RIGHTS FIRST (May 2008) at 70. If the Ninth Circuit decision stands, the prosecutor in a "mixed motive" case risks being held liable for damages if a jury later undertakes an examination of the prosecutor's

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that federal magistrate judges conducted an average of 3,948 material witness hearings each year during FY 2002 through FY 2004. That number was down somewhat from past decades; for example, 6,865 hearings were conducted during FY 1981 and 8,221 were conducted during FY 1980. Charles Doyle, *Arrest and Detention of Material Witnesses*, CRS REPORT FOR CONGRESS, at 3 n.10 (Sept. 8, 2005) (available at www.au.af.mil/au/awc/awcgate/crs/rl33077.pdf).

subjective intent and determines that the predominant reason for a material witness arrest was the prosecutor's suspicion that the individual committed criminal acts. To avoid that risk, prosecutors are likely to avoid use of the material witness statute even if they believe that detaining a witness is likely to yield valuable and otherwise-unavailable evidence for use at trial or before a grand jury.

Ironically, reduced use of the material witness statute could work to the detriment of those under investigation. If law enforcement officials are prohibited from making use of the material witness statute for a terrorism suspect, they will be forced to decide immediately among three options: (1) unconditional release; (2) charging a crime; or (3) designating the suspect an "enemy combatant." Requiring an immediate decision may not be in the best interests of either prosecutors or the suspect.

Given the potentially catastrophic consequences if law enforcement officials fail to act expeditiously on credible evidence regarding potential terrorist activity, they are unlikely to pursue the first option. The material witness statute provides an attractive alternative to the other two options – it allows prosecutors to protect the public safety as their investigation continues, while at the same time providing numerous procedural protections to individuals being detained. For example, they are entitled to a court-appointed lawyer and *must* be released following a deposition unless the court determines that release would result in a "failure of justice." Fed.R.Crim.P. 15(a)(2). District courts are charged with monitoring all material witness detentions

to "eliminate unnecessary detention," and must receive from prosecutors every two weeks a report explaining why they believe that any ongoing detentions must continue. Fed.R.Crim.P. 46(a)(h)(1) & (2).

In contrast, those detained as enemy combatants have considerably fewer procedural rights. And those charged with a crime may well find that the initial charging decision – even in cases in which the existence of probable cause is in doubt – is not easily reversed. Granting prosecutors the option, in close cases, of holding a suspect temporarily under a material witness warrant provides prosecutors with breathing space and reduces the risk of a premature criminal charge or enemy combatant designation.

In sum, the decision below will discourage use of the material witness statute – a development that will hamper criminal law enforcement without necessarily providing any corresponding benefit to criminal suspects. Review is warranted to determine whether that undesirable result is really mandated by the Fourth Amendment.

III. THE DECISION BELOW CONFLICTS WITH *IQBAL* BY IMPOSING SUPERVISORY LIABILITY WITH RESPECT TO THE DELIBERATE-FALSE-STATEMENT CLAIM

Review is also warranted of the appeals court's decision to allow Al-Kidd to proceed with his deliberate-false-statement claim against Ashcroft. That claim is based on a supervisory liability theory of the sort rejected by this Court in *Iqbal*.

The plaintiff in *Iqbal* asserted that the Attorney General and FBI Director could be held personally liable for his injuries, based in part on claims that they had inadequately supervised the government employees who had violated his rights. In rejecting that assertion, the Court made clear that federal officials may be held personally liable for their own misdeeds only, not those of their subordinates:

> Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. . . . Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

Iqbal, 129 S. Ct. at 1948.

Al-Kidd alleges that two FBI agents included false information in the affidavit submitted in support of his material witness warrant (the "Mace Affidavit").[7] All parties agree that a lawsuit may legitimately challenge

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[7] *Amici* note that the allegations of falsity are rather thin. For example, Al-Kidd claims that that he purchased a round-trip ticket to Saudi Arabia, while the affidavit stated that "Kidd is scheduled to take a one-way, first-class flight" to Saudi Arabia. Pet. App. 4a. Those statements are not necessarily in conflict. The affidavit did not say that "Al-Kidd *purchased* a one-way ticket," nor is that the necessary implication of the affidavit. A far more logical interpretation is that the affiant intended to convey that Al-Kidd did not intend to return to the United States in the near future. That assertion was entirely accurate, given Al-Kidd's intention to remain in Saudi Arabia for an extended period of study.

the validity of searches and seizures conducted pursuant to a warrant if the affidavit in support of the warrant included false statements or material omissions that were made intentionally or recklessly. Pet. App. 48a (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). But the complaint includes no allegations that Ashcroft took any steps to encourage the FBI agents or anyone else to include false statements in the Mace Affidavit. In the absence of such allegations, the Ninth Circuit's holding that the deliberate-false-statement claim states a cause of action against Ashcroft conflicts sharply with *Iqbal*'s limitations on supervisory liability.

The Ninth Circuit stated that allegations that Ashcroft encouraged "pretextual" use of § 3144 are sufficient to warrant allowing Al-Kidd to proceed against Ashcroft on the deliberate-false-statement claim. Pet. App. 51a. But the appeals court failed to explain any possible causal relationship. None of the factual allegations asserted by Al-Kidd to support his "pretextual" use claim against Ashcroft can plausibly be viewed as evidence that he encouraged his subordinates to file false affidavits. In the absence of any plausible explanation of a causal relationship, *Iqbal* requires dismissal of the deliberate-false-statement claim under Fed.R.Civ.P. 8(a). 129 S. Ct. at 1950.

The appeals court stated that Ashcroft could be held liable for the acts of the FBI agents on the basis of allegations that he had notice of "abuses occurring under the material witness statute after September 11, 2001," thereby creating a duty on Ashcroft's part to take "affirmative acts to supervise and correct the

actions of his subordinates." Pet. App. 54a.[8] That holding conflicts sharply with *Iqbal*, which prohibits imposition of supervisory liability in the absence of a showing of "purpose" to violate constitutional rights, not mere "knowledge" of others' violations. *Iqbal*, 129 S. Ct. at 1949.

Review is also warranted to allow the Court an opportunity to provide clearer guidance regarding the quantum of evidence necessary to establish supervisory liability. While the Court in *Iqbal* made clear that supervisors may not be held liable absent evidence that they themselves – and not just their subordinates – engaged in misconduct, the Court did not spell out in detail what constitutes the requisite misconduct. One standard that *amici* suggest the Court consider adopting is the D.C. Circuit's standard set forth in *Int'l Action Ctr.*: "A supervisor who merely fails to detect and prevent a subordinate's misconduct . . . cannot be liable for that misconduct. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." 365 F.3d at 28. That standard stands in sharp contrast to the one employed by the Ninth Circuit, which allowed claims to proceed against Ashcroft based on little more than his failure to detect affidavit falsification by others.

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[8] In support of its "notice" allegations, the appeals court cited an April 2003 report from DOJ's Office of Inspector General. *Id.* In fact, that report did "not examine . . . use of material witness warrants." OIG, Dep't of Justice, *The September 11 Detainees*, 4, *available at* http://www.fas.org/irp/agency/doj/oig/detainees.pdf.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 18, 2010

AMICUS CURIAE BRIEF

FILED
JUL 23 2010
OFFICE OF THE CLERK

No. 10-98

In The

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE WESLEY MACNEIL OLIVER IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae and the author of this brief, Wesley MacNeil Oliver, is a legal historian specializing in nineteenth and early-twentieth century American criminal procedure. His research reveals that during this period of time, material witness detentions were quite common and a frequent subject of discussions in newspaper columns, city council and legislative debates, and gubernatorial messages.

The author is an Associate Professor of Law at Widener University in Harrisburg, Pennsylvania,[2] and recently completed his J.S.D. dissertation at Yale Law School entitled *The Nineteenth and Early Twentieth Century Origins of Modern Criminal Procedure: A View from the New York Police*. The panel's decision in the instant case relied on his article, *The Rise and Fall of Material Witness*

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[1] Counsel for both parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae*, made a monetary contribution to its preparation. The Widener University School of Law provided funding for the printing and filing costs.

[2] *Amicus curiae* will be on leave as a Visiting Associate Professor at the University of Tennessee College of Law for the Fall 2010.

Detentions in Nineteenth Century New York, 1 N.Y.U. J.L. & Liberty 727 (2005), in support for its conclusion that the practice of detaining material witnesses dates back to at least the 1840s. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 959 (9th Cir. 2009). The arguments and historical claims in this brief are taken largely from that article and the dissertation.

The author files this brief to correct the lower court's assumptions about the history of material witness detentions. The Ninth Circuit concluded that Ashcroft's use of material witness detentions to hold those suspected of criminal activity was an "unprecedented" use of the power to detain witnesses. *Id.* at 970; *Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1131 (9th Cir. 2010) (Order Denying Rehearing En Banc).

The author's research reveals that the Ninth Circuit's historical conclusion is erroneous. Material witness detentions were frequently used as a mechanism to hold suspects of crimes in the late nineteenth and early twentieth century. Those suspected of no wrongdoing, but possessing information helpful to the government, certainly have been held as witnesses. The more common use of material witness detentions in the late nineteenth and early-twentieth century was, however, to hold those actually suspected of criminal activity. Reformers frequently criticized the detention of material witnesses during this period but were tolerant of the detention of those who were believed to be guilty of wrongdoing.

As Carolyn Ramsey, the only other legal historian to examine the history of this practice, has concluded, material witness detentions in the mid-nineteenth century became "a tool for constructing a case against the witness himself." Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 Ohio St. J. Crim. L. 681, 685 (2009).[3] The research of your *amicus curiae* demonstrates that holding innocent bystanders with helpful information was quite controversial in the late nineteenth and early twentieth century; holding *suspects* as witnesses was not.

As a researcher in this area of legal history, the author has an interest in correcting misconceptions about the past. Of interest to this Court, a correct understanding of the past has implications for the parties in this case. Officials, like the former Attorney General, are entitled to qualified immunity from civil rights actions so long as their official acts do not violate "clearly established" constitutional rights. *Saucier v. Katz*, 533 U.S.

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[3] There are surprisingly few scholarly articles written on material witness detentions. *See, e.g.*, Ricardo J. Bascaus, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 Vand. L. Rev. 677 (2005); Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 Loy. L.A. L. Rev. 1217 (2002); Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 St. John's L. Rev. 483 (2002). The author and Professor Ramsey alone have examined the history of the use of material witness detentions to hold crime suspects. *See* Ramsey, *supra*, at 685.

194, 201 (2001). The Ninth Circuit was required to consider whether "a reasonable officer would understand" that a constitutional right is violated when the federal material witness detention statute is used to hold a witness also suspected of criminal wrongdoing. *Hope v. Pelzer*, 536 U.S. 730 (2002). It is surely relevant to this consideration that, at the point in American history when witness detentions occurred with relative frequency, the public had far more tolerance for the detention of suspects as witnesses than it did for the detention of individuals believed to be innocent of any wrongdoing.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit relied on incorrect historical assumptions to determine that former Attorney General John Ashcroft was not entitled to qualified immunity for his use of material witness detentions in the wake of the terrorist attacks of September 11, 2001. The Ninth Circuit described Ashcroft's use of material witness detentions to hold those suspected of criminal activity as "unprecedented." *Al-Kidd*, 580 F.3d at 970; *Al-Kidd*, 598 F.3d at 1131. This was an important factual premise in its holding that this practice was clearly unconstitutional. As the lower court's factual description is contradicted by the historical record, this Court should review the Ninth Circuit's holding in light an accurate account of the history of material witness detentions.

The lower court held, first, that the use of the federal material witness statute to hold those suspected of terrorist activities violated the Fourth Amendment. 580 F.3d. at 965-70. The court reasoned that this use of material witness detention circumvented the Fourth Amendment's requirement that probable cause exist to hold a person suspected of a crime. *Id.* at 966-67. The court then concluded that this practice violated a "clearly established" Fourth Amendment right to be free from an unreasonable seizure, despite there being only a single federal district court opinion on the issue that forbids pretextual material witness detentions in *dicta*. *Id.* at 972-73 (*citing United States v. Awadalluh*, 202 F.Supp.2d 55, 77 n.28 (S.D.N.Y. 2002).[4]

The Ninth Circuit attributed the absence of precedent condemning the "pretextual" use of material witness detentions to the fact that this was an "unprecedented" and "novel" use of the power. *Al-Kidd*, 580 F.3d at 970; *Al-Kidd*, 598 F.3d at 1131. The court further opined that courts would not have previously had occasion to condemn this practice because the "obviousness of the illegality" prevented officials from using material

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[4] The lower court considered and rejected Ashcroft's claim that he was entitled to absolute immunity. *Al-Kidd*, 580 F.3d at 957-64. The author has discovered no historical evidence suggesting that there is an historical basis for Ashcroft's defense of absolute immunity. The historical record does, however, provide information helpful to analyzing whether Ashcroft violated a "clearly established" constitutional right. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002); *United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

witness detentions to hold suspects prior to September 11. *Id.* at 970.

The Ninth Circuit could have arrived at these conclusions only by ignoring eighty to ninety years of (frequently ignored) history of criminal procedure. Historically, material witness detentions had long been used as "a tool for constructing a case against the witness himself." Ramsey, *supra*, at 685. The long-standing – long-accepted – practice of detaining suspects as witnesses should be considered in determining whether the former Attorney General was "on notice" that the practice was unconstitutional.

Studies on the history of material witness detentions have focused on three cities, New York, Chicago, and Los Angeles, though it is clear that the practice occurred in other American cities, including Boston and New Orleans, in the late nineteenth and early twentieth centuries. *See* Ramsey, *supra*, at 686, 696, 700 n.108; Oliver, *supra*, at 728 n.1; *Dr. Bell's Letter*, 2 Pa. J. on Prison Discipline 97, 98 (1846) (observing practice in Boston). The history of the practice in New York City, the subject of the author's study, has lent itself to the most thorough analysis as better records of early police practices appear to have been kept in New York than in other American cities from the Antebellum to the Progressive Eras.[5]

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[5] The New York Municipal Archives claims that its "[r]ecords pertaining to the administration of criminal justice, dating from 1684 to 1966, constitute the largest and most

It is clear that many of those identified, and detained, as witnesses in all of these cities were in fact suspects. *See* Ramsey, *supra*, at 686. The historical record in New York City, however, allows for a much more complete account of the history of material witness detentions in that city than is possible for other cities in this era.

Whenever New Yorkers expressed objections to the detention of material witness detentions during this period, one type of detainee was the source of their concern – the innocent detainee. Reformers from the 1840s to the 1930s expressly recognized that detaining suspects of crimes as witnesses – thus circumventing the probable cause requirement to arrest and hold a suspect – was not a concern of theirs. The very detailed picture we have of the history of material witness detentions in New York City reveals that the public acceptance of material witness detentions depended on their selective use – the very use of which respondent al-Kidd complains.

Material witness detentions were controversial from the time they first began in the 1840s. The fear that innocent persons would be detained almost immediately prompted calls for abolition of the practice. In the 1850s, reformers were appeased when the City of New York provided better housing for witnesses. By 1883, reformers

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comprehensive collection of such material in the English-speaking world." http://www.nyc.gov/html/records/html/about/archives.shtml (visited July 11, 2010).

accepted another compromise: a new rule that permitted *only* the detention of those witnesses suspected of criminal activity.

The compromise was consistent with the equitable arguments reformers had made since the earliest days of material witness detentions. Even those who objected to detaining persons on the basis that they possessed helpful information seemed content when law enforcement authorities also suspected those "witnesses" of crimes. Objections to holding witnesses persisted into the twentieth century but with a caveat that the detention of those witnesses also reasonably suspected of criminal activity was acceptable.

A somewhat detailed summary of this history is presented below.

A. Origins of Material Witness Detentions

The legal origin of the power to detain witnesses is somewhat unclear. A New York statute dating back to 1829 permitted a magistrate to require witnesses to provide sureties for their appearance and permitted the magistrate to detain witnesses who were unable to do so. Oliver, *supra*, at 734; N.Y. Rev. Stat., part 4, tit. 2 §§ 21-22 (1829). Some nineteenth and early twentieth century critics claimed that statute merely codified a power that existed in England since 1555, others described the 1829 statute as an innovation.[6]

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[6] George Medalie, *A Statement of the Facts and Suggested Remedies*, 8 The Panel 1, 3 (Jan.-Feb. 1930); Oliver, *supra*, at 733.

Whatever the original source of the authority to detain witnesses, the power does not seem to have been used with any frequency until the 1840s. Oliver, *supra*, at 737-40.

The earliest, and most highly publicized, accounts of detained witnesses involved victims of crime, held for weeks or months, until the search for the culprit was abandoned, or the culprit was convicted of some very minor offense. One of the earliest stories reported in New York involved a woman who reported to authorities that a bundle of her clothes had been stolen. She was detained for eight months; the thief was never discovered and she was eventually released. Oliver, *supra*, at 729; N. Y. Prison Association, *Annual Report* 81 (1847). Mid-nineteenth century newspapers, for obvious reasons, took particular offense at stories like these. *See, e.g., A Disgusted Hebrew*, New York Times, Jan. 23, 1878, at 3 (describing detention of man who reported the theft of his hat). There was even more outrage when defendants were released

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36,; N.Y. Legislature, *Report of the Majority and Minority of the Select Committee on Governor's Message Relative to the Imprisonment of Witnesses*, N.Y. Assembly Document No. 68, at 3 (1855), Charles A. Flammer, *The Committing Magistrate* 41 (1881). Sureties operated much like modern bail, except that respectable private citizens were required to swear that they would be answerable for the amount of the bail. A witness, or suspect, to be released on such a recognizance could obtain his release by either posting the entire amount of the required recognizance, or by contracting with a professional bail bondsman to be responsible for the amount in the event he failed to appear. *See* Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)*, at 507-10 (1970).

on bond while the witnesses against them were held as witnesses. *See e.g.*, David R. Johnson, *The New York Police: Colonial Times to 1901*, at 76 (1970) (describing account of detention of rape victim while suspect went free on bond).[7]

Newspapermen were far from the only people talking about the injustices visited by material witness detentions by the second half of the nineteenth century. Mayors, jailors, and even the author Charles Dickens began to express concern about how the power to detain witnesses was being exercised. Accounts focused on the burden placed on innocent bystanders, or victims of crimes, when they were held as witnesses.

In 1841, Mayor Robert H. Morris complained about the conditions in which detained witnesses were being housed. He proposed that a facility, considerably more comfortable than the Tombs, New York City's general-purpose jail, be created for the accommodation of *some* witnesses. For witnesses suspected of being accomplices to crimes, Morris proposed no improvement in their conditions. For those who were merely in the possession of helpful information, he proposed better treatment. Oliver, *supra*, at 766; Robert H.

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[7] For reasons that have not fully been explained, a number of rape victims were detained as witnesses against their alleged attackers in the second half of the nineteenth century. Forty women in New York City were held as witnesses against their attackers from 1873 to 1882. *See* Oliver, *supra*, at 759 & n.120.

Morris, *Mayor's Message*, 8 Documents of the Board of Aldermen of New York City, Doc. 1, at 7-9 (1841).

The City Jailor two years later would similarly object to housing those "who, through no fault of their own, are placed at the mercy of our laws" in the general jail population. Oliver, *supra*, at 767; M. Fallon, *Report of the Keeper of the City Prison*, 10 Documents of the Board of Aldermen of New York City, Doc. 53, at 957 (1844).

In 1842, Charles Dickens described seeing a nine-year-old boy housed in the Tombs as a material witness against his father, who was held in the same facility. Charles Dickens, *American Notes* 111 (1842) (Random House 1996).

Though the concerns about material witness detentions in the 1840s focused on detainees suspected of no wrongdoing, reform efforts unsuccessfully advocated eliminating the power to detain any person as a witness. Efforts to abolish the power were strenuously made in the Constitutional Convention of 1846, but were ultimately defeated. Oliver, *supra*, at 769; William G. Bishop & William H. Attree, *Report of the Debate and Proceedings of the Convention of the Constitution of the State of New York* 196, 1050, 1062 (1846).

Calls for the abolition of material witness detention would nevertheless continue into the 1850s, most prominently from the New York Prison Association. The Association, a philanthropic

organization dedicated to more humane and effective prisons, criticized the practice of holding witnesses in each of its annual messages beginning with its inaugural message in 1847. Oliver, *supra*, at 731 n.16. The organization boasted some of the most influential reformers of the day as its members, including Alexis de Tocqueville, Gustav de Beaumont, Thomas Galludet, and Charles Sumner. Oliver, *supra*, at 768 n.140. The practice of detaining witnesses – and holding them within the city jail – continued unabated until the mid-1850s despite their efforts.

B. Increased Attention in the 1850s Prompts the Creation of a House of Detention for Witnesses

Reformers through the 1850s had not adopted the dichotomy Mayor Morris had described in 1841 between "innocent" witnesses and accomplice-witnesses. Their accounts continued to focus on innocent detainees, but they had not embraced more lax rules when dealing with the witnesses who were suspected of wrongdoing themselves. This would come decades later. Their agitation did, however, spark a compromise reform – better conditions for witnesses, all witnesses, not just the "innocent" witnesses as Mayor Morris had advocated a decade earlier.

Reformers convinced the legislature that if the practice of material witness detention were to continue, detainees should be afforded better

accommodations. Reformers had, of course, made two objections to the detention of witnesses for over a decade: that they were detained at all and that they were held in the general jail population. This compromise overcame one of the objections.

Construction of the House of Detention for Witnesses was authorized by an 1857 act. Oliver, *supra*, at 754-55. Under the new law, all witnesses were to be housed in this facility rather than the Tombs. *See* Metropolitan Police Act, 1857 N.Y. Laws 569.

By the 1870s, as many 668 people would spend time in the facility, on average for no longer than 10 to 20 days. Oliver, *supra*, at 762. In the early years of the facility, the *New York Daily Times* reported that the conditions in the house were quite good. *Id.* at 755; *A Visit to the House of Detention*, New York Times, Oct. 4, 1859, at 8. By the 1870s, accounts of the facility were not nearly so positive. A grand jury found that the facility was not "fit for human habitation." Oliver, *supra*, at 755-56 & n.113; *Grand Jury Presentments*, New York Times, Jan. 4, 1874, at 8. At this point, reformers began anew to agitate for an end of witness detentions and with their agitation came a new compromise – a distinction between those merely in possession of helpful information and those suspected of wrongdoing who happened to possess helpful information.

C. Continued Protests to Prevent the Detention of Innocent Witnesses Leads to Dichotomy Between "Innocent" and Accomplice-Witnessses

Another round of reform efforts from the late 1860s through the early 1880s produced a second compromise that seemed to reflect all the objections reformers had implicitly made to material witness detentions. An 1883 law would prohibit the detention of witnesses who were not "reasonably believed" to be accomplices to a crime. 1883 N.Y. Laws 416. As a result of the law, bystanders and victims could no longer be held and those suspected of wrongdoing, but not formally charged, would be held in House of Detention for Witnesses, not in the City's general jail population.

As conditions in the House of Detentions for Witnesses worsened in the 1860s and 1870s, a variety of influential New Yorkers had picked up where other reformers had left off and lobbied the legislature to abolish witness detentions. Among them were the sitting Governor, a former Attorney General for the State of New York and, most significantly, the New York Police Department. Oliver, *supra*, at 775-77. Concerns about being held as a witness had become so pervasive that eyewitnesses had become afraid to speak to officers for fear of being whisked off to the House of Detention for Witnesses. *Id.* at 776; *Metropolitan*

Police Report, N.Y. Assembly Documents, Doc. 38, at 9 (1869). The police therefore asked the legislature to make a very clear statement that individuals would not be jailed for assisting police – even if this meant eliminating the power they possessed to hold suspects they lacked adequate suspicion to charge. *Id.*

With reformers still focused on the plight of innocent detainees, the compromise that would develop in 1883 is hardly surprising. In April of 1881, *Harper's Weekly* published a cartoon, reproduced below, illustrate a particular injustice that had been a rallying example for reformers since the earliest known detained witnesses. The cartoon depicted a witness to a crime held in the House of Detention for Witnesses, while the defendant he was to testified against drank in a bar while out on bond pending trial. The honest seeming figure on the left languished in House of Detention for Witnesses while the knave depicted on the right boldly displayed a copy of his indictment with a notation at the bottom that he is out on bail.

Figure One. *An Unjust Law*, Harper's Weekly, April 9, 1881, at 1. The caption at the bottom of the cartoon reads, "The Innocent Witness Detained as a Prisoner, whilst the Criminal Goes Free."

The first legislative effort in the 1880s to address reformers' concerns appears to have had little effect. In the state's new Code of Criminal Procedure, the legislature provided that a witness' financial inability to provide a bond securing his appearance at trial could not be the basis for detaining him. N.Y. Code of Crim. Pro. § 219 (1881). For reasons that are not entirely clear, however, the numbers of persons detained as witnesses did not noticeably decrease, and in 1882 the Grand Jury of New York County urged, as many others before them had done, the abolition of material witness detentions. Oliver, *supra*, at 780.

The legislature of 1883 then changed the law once again, providing that only those "reasonably believed" to be accomplices could be held as

witnesses. 1883 N.Y. Laws 416; Oliver, *supra*, at 780. With this law, the legislature forbade the type of detention that had been the thrust of reformers' complaints.

There was a noticeable decrease in the number of persons held following the adoption of the new statute, but a considerable number of people were still held as "witnesses." In the years 1878, 1879, and 1880, 466, 448, and 455 people were held in the house respectively. Oliver, *supra*, at 762. In 1883, 1884, and 1885, 228, 286, and 328 people were held respectively. *Id.*

The most logical inference is that many of the persons held by the late 1870s were, in fact, suspects. This would also explain why the police were willing to give up the power to hold witnesses entirely in the 1870s. If the majority of "witnesses" were, in fact, accomplices, they could have been detained using the ordinary criminal process. The House of Detention for Witnesses had, however, given the New Police Department a mechanism to separate some accomplices and provide them better treatment, perhaps in the hope they would cooperate with the prosecution. *See* Ramsey, *supra*, at 681.

Regardless of how the New York Police Department was actually using the power it was given prior to 1883, one thing was quite clear: reformers in New York prior to 1883 were concerned primarily about innocent detainees and

the compromise legislation captured this concern. If there was concern that the NYPD would use this mechanism to circumvent the probable cause standard typically required to detain a criminal suspect, it certainly was not voiced, before or after the reform of 1883. The examples reformers used – and the statute enacted in 1883 – strongly suggest that New Yorkers had little trouble with a fairly frequently used mechanism to hold suspects as witnesses without a demonstration of probable cause of their guilt.

D. The Re-Emergence of Concern for the Innocent Detainee

By the early twentieth century, the New York Legislature restored the power of police and prosecutors to seek the detention of persons with helpful information, regardless of whether those persons were suspected of involvement in a crime. N.Y. Code of Crim. Pro. § 618-b (1904). No great notice appears to have been taken of the the restoration of the power to detain "innocent" witnesses until Prohibition prompted substantial reconsideration of the criminal justice system. When the Grand Jury of New York County again considered the issue of material witness detention in 1930, it once again focused on the problem of those detained but suspected of no wrongdoing. It expressly found no problem with holding suspects as witnesses.

A variety of criminal justice reforms were proposed in the mid- to late-1920s and 1930s as Prohibition awakened the American conscience to problems associated with various police tactics. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure,* 105 Yale L. J. 393, 435 n.180 (1995) (observing that the high-profile Wickersham Commission examined a number of aspects of the the criminal justice system, including Prohibition enforcement).

Material witness detentions during this period have largely been overlooked by lawyers and historians as other issues were of more pressing concern during Prohibition. The Wickersham Commission, for instance, revealed a number of concerns about the administration of criminal justice during Prohibition but included little more than a passing reference to material witness detentions. *See* Ramsey, *supra,* at 684. The Commission has primarily been remembered for its discussion of interrogations and, to a lesser extent, its discussion of reckless and sometimes brutal methods of search and seizure. *See Miranda v. Arizona,* 384 U.S. 436, 445 n.5 (1966) (describing Commission's concern about interrogation practices); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State,* 48 Wm. & Mary L. Rev. 1, 161 n.538 (2006) (describing Commission's consideration of excesses in searches and seizure during Prohibition).

Locally, in New York City, judges, politicians, and lawyers working through the Bar Association

of New York City placed their focus on similar issues. *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 Rutgers L. Rev. 447, 494-509, 510-515 (2010) (describing New York City's response to search and seizure and interrogation practices during Prohibition). The practices of virtually every aspect of the criminal justice system were nevertheless placed under a microscope during the Prohibition Era and material witness detentions were no exception.

The Association of Grand Jurors of New York County published a report in early 1930 echoing the concerns expressed by reformers throughout the nineteenth century. George Z. Medalie, *A Statement of Facts and Suggested Remedies,* 8 The Panel 1 (Jan.-Feb. 1930).[8] The report accounted the injustices done to innocent persons held to secure their testimony. One particularly gripping, yet familiar tale involved a sailor who witnessed a crime and was held for months pending the trial of a culprit who posted bond as the sailor sat in jail. *Id.* at 1.

The report recognized that often detained witnesses were, in fact, uncharged suspects – and expressed no concern about their detention.

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[8] *The Panel* was published by the Association of Grand Jurors in New York County and dedicated its first publication of 1930 to a symposium on the subject of material witness detentions.

> There is first the class of persons who in some way or other are concerned more or less as accomplices in the commission of the crime charged. The law provides that they be held as material witnesses on bail or be committed in the absence of bail. There is no point in wasting sympathy about the inconvenience to which they may be subjected if they are so held or detained.

Id. at 2. *See also Discussion by Edward A. Alexander and George E. Worthington of the New York Bar,* 8 The Panel, 4, 5 (Jan.-Feb. 1930) (describing with horror with detention of pregnant women "whose only difficulty is that they have been the witness of some serious crime, thus subjecting them to detention as witnesses."); John S. Kennedy, *A Report to the State Commission of Correction,* 8 The Panel, 5, 6 (Jan.-Feb. 1930) (describing a victim being held while the person charged with the crime against him was out on bail).

The report then described a "more troublesome type of material witness detention," the detention of "underworld characters" whose allegiances prevent them from providing helpful information to investigators, if they happen to possess such information. The grand jurors concluded that if it was established that these characters were, in fact, in possession of information material to a prosecution, their detention was appropriate. Noting that such detentions were "not within the

contemplation of our law," the grand jurors observed that "[j]ust judges and public-spirited citizens, however, are hardly inclined to voice a protest at this strain of a legal principle." Medalie, *supra*, at 2.

Like their nineteenth century counterparts, these Prohibition Era reformers sought to improve the lot of those poor souls who, innocent of any crime, were incarcerated to ensure that prosecutions were not lost for lack of evidence. They demonstrated no concern that witnesses might also be suspects – and thus temporarily held on a standard less exacting than probable cause. They even recognized the common practice – and widespread acceptance – of detaining material witnesses who were neither witnesses nor suspects, but merely affiliated with the emerging world of organized crime.

Pretextual detentions of material witnesses thus not only occurred prior to the Terror of September 11, 2001, but the practice was generally accepted for at least eighty years. This fact is difficult to reconcile with the Ninth Circuit panel's conclusion in the instant case describing the practice as "unprecedented" and noting that the lack of authority condemning this use of witness detention is "due more to the obviousness of the illegality than the novelty of the legal issue." *Al-Kidd*, 580 F.3d at 970.

CONCLUSION

For nearly a century police and prosecutors used material witness detentions in exactly the same way former Attorney General John Ashcroft is alleged to have used them in this case. Of course the world has been transformed many times since the heyday of material witness detentions in the Gilded Age and reasonable people could find that practices acceptable in that time violate the Constitution in the modern era. But this historical background is certainly relevant in determining whether it was "apparent" to the former Attorney General that he was violating the Constitution when he held those he suspected of terrorism as material witnesses. Given the Ninth Circuit's reliance on incorrect historical facts, this Court ought to consider this issue in light of the accurate historical record.

Respectfully submitted,

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Date: July 23, 2010

JOINT APPENDIX

SUPREME COURT, U.S.
FILED
DEC 13 2010
OFFICE OF THE CLERK

No. 10-98

In the Supreme Court of the United States

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JULY 16, 2010
CERTIORARI GRANTED: OCT. 18, 2010

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-36059

ABDULLAH AL-KIDD, PLAINTIFF-APPELLEE

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/11/06	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. Setting schedule as follows: appellant's opening brief is due 1/22/07; appellees' brief is due 2/22/07; appellants' optional reply brief is due 14 days from service of aples brief. 3/19/07,, ; [06-36059] (SW)
		* * * * *
1/23/07	9	Filed original and 15 copies Appellant Alberto R. Gonzales, Appellant John Ashcroft, Appellant Robert Mueller, Appellant Michael Chertoff, Appellant Dennis

DATE	DOCKET NUMBER	PROCEEDINGS
		Callahan, Appellant Vaughn Killeen, Appellant James Gneckow, Appellant Scott Mace, Appellant U.S. Dept. of Justice, Appellant U.S. Dept. Homeland, Appellant FBI, Appellant Terrorist Screening, Appellant Donna Bucella, Appellant United States opening brief (Informal: No) 49 pages and five excerpts of record in 1 volume; served on 1/22/07 [06-36059] (RT)
		* * * * *
5/29/07	20	Filed original and 15 copies appellee Abdullah Al-Kidd's 64 pages brief; served on 5/25/07 [06-36059] (RT)
		* * * * *
6/26/07	32	Filed original and 15 copies appellants' reply brief, (Informal: No) 30 pages; served on 6/25/07 [06-36059] (RT)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/8/08	42	ARGUED AND SUBMITTED TO DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.. (KM)
		* * * * *
6/23/08	44	Filed order (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.): Submission of this case is vacated and shall be deferred pending the disposition by the United States Supreme Court in Van de Kamp v. Goldstein, No. 07-854, and Ashcroft v. Iqbal, No. 07-1015. The panel requests supplementary briefing by the parties regarding the effect, if any, of the Supreme Court's dispositions in these cases, due no later than twenty (20) days after the filing of the later of the two dispositions. Dispositions shall be deemed to have occurred respecting each such case when the Supreme Court first files an opinion, memorandum, or other order disposing of the same. Petitions to the Supreme Court to rehear such case or cases shall

DATE	DOCKET NUMBER	PROCEEDINGS
		not be considered in the timing contemplated by this order. The simultaneous briefs may be in letter form, and shall not exceed fifteen (15) double-spaced pages. (WL)
		* * * * *
6/8/09	46	Submitted (ECF) Supplemental brief for review. Submitted by Appellant John Ashcroft. Date of service: 06/08/2009. [6948679] (MMC)
		* * * * *
6/10/09	51	Submitted (ECF) Supplemental brief for review. Submitted by Appellee Abdullah Al-Kidd. Date of service: 06/08/2009. [6951261] (LPG)
		Filed clerk order: Supplemental Brief [51] filed by Abdullah Al-Kidd. No paper copies of this brief are required. (LA)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/4/09	57	Filed order (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.) The case is resubmitted as of 09/04/09. [7052143] (PH)
		* * * * *
9/4/09	59	FILED OPINION (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.) For the reasons indicated in this opinion, we AFFIRM in part and REVERSE in part the decision of the district court. Each party shall bear its own costs on appeal. Judge: DRT, Judge: CTB Concurring & Dissenting, Judge: MDS Authoring. FILED AND ENTERED JUDGMENT.— [Edited 09/08/2009 by ASW-Opinion resent with correction.] [7052176] (PH)
		* * * * *
10/19/09	60	Filed (ECF) Appellant John Ashcroft petition for rehearing en banc (from 09/04/2009 opinion). Date of service: 10/19/2009. [7099274] (MMC)

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/09	61	Filed order (MILAN D. SMITH, JR.) Plaintiff-Appellee is directed to file a response to Defendant-Appellant's petition for rehearing en banc, filed with this court on October 19, 2009. The response shall not exceed 15 pages, unless it complies with the alternative length limitations of 4200 words, or 390 lines of text, Circuit Rule 40-1(a), and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [7100253] (WL)
11/10/09	62	Filed (ECF) Appellee Abdullah Al-Kidd response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges). Date of service: 11/10/2009. [7126109]. (LPG)

DATE	DOCKET NUMBER	PROCEEDINGS
3/18/2010	63	Filed Order for PUBLICATION (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.) The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. Judge Bybee was recused in this matter. The petition for rehearing en banc is DENIED. [7270768] Judge M. Smith concurs, Judges DFO and RMG dissent from the order Denying Petition for Rehearing with suggestion Rehearing En Banc. (PH)

* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
(Boise - Southern)

No. 1:05-cv-00093-EJL-MHW

ABDULLAH AL-KIDD, PLAINTIFF

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/15/05	1	COMPLAINT against all defs (Filing fee $ 250.), filed by Abdullah Al-Kidd. (Attachments: # 1 Civil Cover Sheet) (dkh,)
		* * * * *
11/18/05	40	AMENDED COMPLAINT against all defendants, filed by Abdullah Al-Kidd. (Woolley, Cynthia)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/24/06	55	MOTION to Dismiss by Dennis M Callahan, James Gneckow, Scott Mace, John Ashcroft. Responses due by 2/17/2006 (Christian, Forrest)
		* * * * *
3/15/06	63	MEMORANDUM in Opposition re 55 MOTION to Dismiss filed by Abdullah Al-Kidd. Replies due by 4/14/2006. (Gelernt, Lee)
		* * * * *
5/15/06	71	REPLY to Response to Motion re 55 MOTION to Dismiss filed by Dennis M Callahan, James Gneckow, Scott Mace, John Ashcroft. (Christian, Forrest)
		* * * * *
9/27/06	79	ORDER denying 47 Motion to Dismiss, denying 55 Motion to Dismiss, granting 58 Motion to Substitute Party. Dennis M Callahan terminated and substituted dft John Sugrue, Former Warden, Oklahoma Federal Transfer Center; The Government is granted leave to file a motion to

DATE	DOCKET NUMBER	PROCEEDINGS
		dismiss as to dft Surgue on or before 10/30/06. Signed by Judge Edward J. Lodge. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by dks,)
		* * * * *
11/27/06	89	NOTICE OF APPEAL as to 79 Order on Motion to Dismiss,, Order on Motion to Substitute Party,,, by John Ashcroft. (Notice sent by e-mail to Court Reporter) (Meeks, J)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 05-093-EJL

ABDULLAH AL-KIDD, PLAINTIFF

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES; JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; JAMES DUNNING, SHERIFF FOR THE CITY OF ALEXANDRIA; DENNIS M. CALLAHAN, FORMER WARDEN, OKLAHOMA FEDERAL TRANSFER CENTER; VAUGHN KILLEEN, FORMER SHERIFF OF ADA COUNTY; FBI AGENTS MICHAEL JAMES GNECKOW, SCOTT MACE; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; FEDERAL BUREAU OF INVESTIGATION; TERRORIST SCREENING CENTER; DONNA BUCELLA, DIRECTOR OF THE TERRORIST SCREENING CENTER; UNITED STATES; JOHN DOES 1-25, DEFENDANTS

Filed: Nov. 18, 2005

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Abdullah al-Kidd, through counsel, hereby complains and alleges the following:

INTRODUCTION

1. This case involves a gross abuse of the government's power under the federal material witness statute. *See* 18 U.S.C. § 3144 (material witness statute).

2. The material witness statute gives the government the power to arrest a wholly innocent individual, without charges, solely for the purpose of securing his testimony in a criminal proceeding. Not surprisingly, however, the statute places strict limits on the use of this extraordinary power, limits likewise mandated by the United States Constitution.

3. Three safeguards are especially critical. First, and fundamentally, the statute may not be used as a pretext to arrest an individual whom the government lacks probable cause to charge with a crime but nonetheless wishes to detain preventively and/or to hold for further investigation. Second, even where an individual is genuinely sought as a witness, and not as a criminal suspect, the witness may not be arrested unless he has engaged in some action that provides a legitimate basis for reasonably believing that his testimony could not be secured voluntarily or by issuance of a subpoena. Finally, an individual arrested as a material witness must be detained under conditions consistent with his status as an innocent witness, and not under the conditions used to jail criminal suspects, much less those actually convicted of a crime.

4. In the aftermath of September 11, 2001, the government has blatantly and systematically ignored all three of these essential safeguards, as well as numerous

others mandated by statute and the Constitution. The facts of this case acutely illustrate the illegality of the government's post-9/11 material witness policies and practices.

5. In March 2003, plaintiff Abdullah al-Kidd was humiliatingly arrested at Dulles International Airport on a material witness warrant and led away in handcuffs in front of scores of onlookers by agents of the Federal Bureau of Investigation (FBI). After interrogating Mr. al-Kidd, the FBI had him jailed at the Alexandria Detention Center in Virginia.

6. Over the next fifteen days, Mr. al-Kidd was shuffled between three different detention facilities across the country. When transported between facilities, he was shackled with leg restraints, a "belly chain" and a set of handcuffs looped through the chain so that his hands could not move more than a few inches from his waist. At each facility, he was held under high-security conditions and rarely permitted to leave his cell, often spending twenty-three hours a day in lockdown.

7. On some occasions, Mr. al-Kidd was singled out for treatment worse than that afforded the other individuals housed in the high-security wing, many of whom had been charged or convicted of serious crimes. At one facility, for example, Mr. al-Kidd was required to remove his clothes and to sit naked in a cell in view of a female guard and the other detainees, all of whom were fully clothed.

8. On March 27, 2003, while Mr. al-Kidd remained in detention, the Director of the FBI, Robert Mueller, brought Mr. al-Kidd's case to the attention of the United States Congress. Testifying before a House subcommittee, Director Mueller stated that the government

was making progress in the fight against terrorism and that there had been more than 200 "suspected terrorists . . . charged with crimes, 108 of whom have been convicted to date." The Director then offered a number of examples of the government's recent successes in combating terrorism. The Director's first example was the capture of Khalid Shaikh Mohammed, who according to the government was the "mastermind" of the September 11 attacks and is supposedly being held in a secret location abroad. The next example Director Mueller gave was the arrest of Mr. al-Kidd. He then listed three additional examples, all of which involved individuals who had been criminally charged with terrorism-related offenses. The Director's testimony did not mention that Mr. al-Kidd had been arrested as a witness, and not on criminal charges.

9. Mr. al-Kidd was eventually released from detention on March 31, 2003, but ordered to live with his wife and in-laws in Nevada and restricted to traveling within Nevada and three other states. More than fourteen months later, the trial for which Mr. al-Kidd's testimony was supposedly needed ended without a conviction on a single count. Mr. al-Kidd was never called as a witness (and was never subsequently charged with a crime).

10. Even after the trial concluded, the government did not move to have Mr. al-Kidd dismissed as a material witness. Instead, Mr. al-Kidd filed a motion with the Court to lift the restrictions and to dismiss him as a material witness, which the Court granted in June 2004.

11. To this day, the government has never explained why the Director of the FBI would tell the United States Congress that the arrest of Mr. al-Kidd—supposedly a witness—represented one of the government's notewor-

thy recent successes in the war on terrorism. Nor has the government ever explained why Director Mueller's testimony failed to mention the fact that Mr. al-Kidd had been arrested only as a witness, and not on criminal charges.

12. The government has likewise never explained why a supposed witness would need to be routinely shackled when transported. Nor has the government explained why a witness would need to be detained under high-security conditions.

13. Most importantly, the government has never explained why Mr. al-Kidd had to be arrested and detained at all (even assuming that the government genuinely had believed it needed his testimony). Indeed, the government was able to secure a material witness warrant for Mr. al-Kidd's arrest only by providing the Court with a patently false and wholly misleading affidavit. That affidavit contained only three sentences directly addressing why the government believed it could not secure Mr. al-Kidd's testimony without arresting him:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.
>
> * * *
>
> It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

See Affidavit at ¶¶ 7, 8 (Attached as Exhibit A).

14. The government has since admitted, however, that through further investigation it learned that Mr. al-Kidd had a round-trip ticket, and not a one-way ticket (an admission made only after Mr. al-Kidd had spent more than two weeks in detention). Furthermore, Mr. al-Kidd did not have a first-class ticket costing approximately $5,000, as the affidavit alleged, but rather, a coach-class ticket costing less than $2,000.

15. In addition to the false statements, the affidavit was wholly misleading in what it omitted to tell the Court. Among other things, the affidavit failed to inform the Court:

- that Mr. al-Kidd was not a Saudi national returning to his home country, but rather a native-born United States citizen and a graduate of the University of Idaho;

- that Mr. al-Kidd had a wife, child, parents and siblings who were native-born United States citizens living in this country;

- that Mr. al-Kidd had talked with the FBI on several occasions prior to his arrest, either in-person or on the phone, and had voluntarily answered dozens of questions for hours on a wide range of topics;

- that each of these in-person conversations had taken place at his mother's home (where Mr. al-Kidd was living at the time) and that Mr. al-Kidd had never failed to show up to these prearranged meetings;

- that prior to his arrest, Mr. al-Kidd had not heard from the FBI for approximately six months;

- that the FBI had never told Mr. al-Kidd that he might be needed as a witness at some point, that he

could not travel abroad, or that he must inform the FBI if he did intend to travel abroad; and finally,

- that Mr. al-Kidd was never asked if he would be willing to testify, to voluntarily relinquish his passport or to otherwise postpone his trip to Saudi Arabia (where he was scheduled to further his studies at a well-known university).

16. Instead, the government simply blind sided a cooperative United States citizen months after they had last contacted him, without ever giving him the opportunity to cooperate voluntarily—all under the pretense that his testimony was critically needed in a future trial (a trial in which Mr. al-Kidd was never even called to testify).

17. Mr. al-Kidd brings this action to vindicate his statutory and constitutional rights to be free from arbitrary and punitive arrest and detention. He seeks a declaration that his rights were violated and an order expunging his unlawful arrest record. He also seeks an appropriate amount of monetary damages for his harrowing and wholly unnecessary experience. The Defendants are the United States, the responsible federal agencies, and various federal and state officials.

JURISDICTION AND VENUE

18. This case is brought pursuant to, *inter alia*, the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; *Bivens*; the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*; 42 U.S.C. § 1983; and 18 U.S.C. §§ 3142, 3144. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court has jurisdiction under

28 U.S.C. § 1331; 28 U.S.C. § 1343; 28 U.S.C. § 1346; 28 U.S.C. § 2201; and 28 U.S.C. § 2202.

19. By letter dated September 15, 2005, Mr. al-Kidd was informed by the FBI that his administrative claims under the Federal Tort Claims Act (FTCA) had been denied (Attached as Exhibit B). Mr. al-Kidd has thus exhausted his administrative remedies for purposes of his claims under the FTCA. *See* 28 U.S.C. §§ 2675, 1346.

20. Venue is proper in the District of Idaho because a substantial part of the events complained of and giving rise to Plaintiff's claims occurred in this District. *See* 28 U.S.C. §§ 1391(b), 1391(e), 1402(b).

PARTIES

21. Plaintiff ABDULLAH AL-KIDD is a United States citizen currently living in Las Vegas, Nevada.

22. Defendant ALBERTO GONZALES is the Attorney General of the United States of America. As Attorney General, he has ultimate responsibility for the United States Department of Justice and the Federal Bureau of Investigation, the Bureau of Prisons and the United States Marshals Service. In this capacity, Defendant Gonzales has responsibility for administering the material witness statute, and also has oversight of various databases that contain and disseminate arrest and detention records. Defendant Gonzales is the successor to John Ashcroft, who served as Attorney General of the United States until February 2005. Defendant Gonzales is sued in his official capacity.

23. Defendant JOHN ASHCROFT was the Attorney General of the United States of America from 2001-2005, and at the time Mr. al-Kidd was arrested and detained.

As Attorney General, he had ultimate responsibility for the United States Department of Justice, the Federal Bureau of Investigation, the Bureau of Prisons and the United States Marshals Service. In this capacity, Defendant Ashcroft had responsibility for administering the material witness statute, and also had responsibility for the maintenance and operation of various databases that contain and disseminate arrest and detention records. Defendant Ashcroft is sued in his individual capacity for damages.

24. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation. As Director, he has responsibility for administering the material witness statute and also has responsibility for the maintenance and operation of various databases that contain and disseminate arrest and detention records. Defendant Mueller is sued in his official capacity.

25. MICHAEL CHERTOFF is the Secretary of the Department of Homeland Security. As Secretary of Homeland Security, he has responsibility for the maintenance and operation of various databases that contain and disseminate arrest and detention records. Defendant Chertoff is sued in his official capacity.

26. Defendant SCOTT MACE is the FBI agent who prepared and signed the affidavit submitted in support of the application to arrest Mr. al-Kidd as a material witness. Defendant Mace is sued in his individual capacity for damages.

27. Defendant MICHAEL JAMES GNECKOW was an FBI agent referenced in the affidavit submitted in support of the material witness application in Mr. al-Kidd's case. According to the affidavit, Defendant Gneckow provided Defendant Mace with information for the

factual assertions in the affidavit. Defendant Gneckow is sued in his individual capacity for damages.

28. Defendant JAMES DUNNING is, and was at all relevant times to this complaint, the Sheriff for the City of Alexandria, Virginia. As Sheriff, Defendant Dunning had responsibility for the conditions under which Mr. al-Kidd was confined at the Alexandria Detention Center. As Sheriff, Defendant Dunning was responsible for subjecting Mr. al-Kidd to punitive, unreasonable and excessively harsh conditions in violation of the Constitution and federal statutes. Defendant Dunning is sued in his individual capacity for damages.

29. Defendant DENNIS M. CALLAHAN, at all relevant times to this complaint, was the Warden for the Oklahoma Federal Transfer Center. While Warden, Defendant Callahan had responsibility for the conditions under which Mr. al-Kidd was confined. While Warden, Defendant Callahan was responsible for subjecting Mr. al-Kidd to punitive, unreasonable and excessively harsh conditions in violation of the Constitution and federal statutes. Upon information and belief, Defendant Callahan is no longer the Warden of the Oklahoma Federal Transfer Center. Defendant Callahan is sued in his individual capacity for damages.

30. Defendant VAUGHN KILLEEN, at all relevant times to this complaint, was the Sheriff of Ada County, Idaho. While Sheriff, Defendant Killeen had responsibility for the conditions under which Mr. al-Kidd was confined at the Ada County Jail. While Sheriff, Defendant Killeen was responsible for subjecting Mr. al-Kidd to punitive, unreasonable and excessively harsh conditions in violation of the Constitution and federal statutes. Upon information and belief, Defendant Killeen is no longer

Sheriff of Ada County. Defendant Killeen is sued in his individual capacity for damages.

31. Defendant UNITED STATES DEPARTMENT OF JUSTICE ("DOJ") is a federal agency authorized by statute to arrest material witnesses, impose conditions of confinement on material witnesses, and to administer and maintain various databases that contain and are used to disseminate arrest, detention and other records.

32. Defendant UNITED STATES DEPARTMENT OF HOMELAND SECURITY ("DHS") is a federal agency that operates and maintains federal databases that contain and are used to disseminate arrest, detention and homeland-security related records.

33. Defendant FEDERAL BUREAU OF INVESTIGATION ("FBI") is the agency within DOJ responsible for gathering intelligence for material witness and criminal proceedings, seeking warrants, executing arrests, and administering certain databases that contain and are used to disseminate arrest, detention and other records.

34. Defendant TERRORIST SCREENING CENTER ("TSC") is a multi-agency program established by Homeland Security Presidential Directive 6. Upon information and belief, it is housed within the FBI to centralize foreign and domestic intelligence, criminal information, and homeland security data for dissemination to law enforcement officials and others.

35. Defendant DONNA BUCELLA is the Director of the Terrorist Screening Center and has ultimate responsibility for the Center's actions, including the maintenance and dissemination of arrest, detention and re-

cords relating to terrorism investigations. Defendant Bucella is sued in her official capacity.

36. Defendant UNITED STATES is sued under the Federal Tort Claims Act, 28 U.S.C. § 1346, for the tortious acts of its employees.

37. Plaintiff is unaware of the true names and capacities, whether individual or otherwise, of Defendant DOES 1 through 25, inclusive, and therefore sues those Defendants by fictitious names. Plaintiff is informed and believes, and on that basis alleges, that these DOE Defendants, and each of them, are in some manner responsible and liable for the acts and/or damages alleged in this Complaint, and that among these DOE Defendants are supervisory employees and federal and state agents who acted under color of law. Plaintiff will amend this Complaint to allege the DOE Defendants' true names and capacities when they have been ascertained.

JURY DEMAND

38. Plaintiff demands a trial by jury in this action on each of his claims triable by jury.

FACTS

39. Mr. al-Kidd is a 33-year-old African-American man born in Wichita, Kansas in 1972 and raised near Seattle, Washington. His mother, father and siblings are all native-born United States citizens. Mr. al-Kidd has two native-born United States children. All of these individuals have always resided in the United States.

40. Mr. al-Kidd graduated from the University of Idaho, where he was a standout running back on the

football team. Before graduating, Mr. al-Kidd converted to Islam and changed his name from Lavoni T. Kidd to Abdullah al-Kidd.

41. After graduation, Mr. al-Kidd worked for various social and charitable organizations.

42. While at the University of Idaho, and after graduation, Mr. al-Kidd traveled abroad to further his religious studies. He returned to the United States on each occasion. At the time of his arrest, Mr. al-Kidd was traveling to Saudi Arabia for the purpose of further language and religious study at a well-known university to which he had received a scholarship.

The Material Witness Application

43. Following September 11, 2001, the government began a broad anti-terrorism investigation in Idaho focusing in particular on Muslim and/or Arab men.

44. During the spring and summer of 2002, FBI agents conducted surveillance of Mr. al-Kidd and his then-wife (also a native-born United States citizen) as part of their broad terrorism investigation. The FBI surveillance logs do not report any illegal activity.

45. On February 13, 2003, an Indictment was filed in the United States District Court for the District of Idaho in the case of Sami Omar Al-Hussayen, a graduate student at the University of Idaho. The Indictment alleged that Mr. Al-Hussayen had committed visa fraud and had made false statements to United States officials.

46. Approximately one month later, on March 14, 2003, the United States Attorney's Office submitted an application in the United States District Court for the District of Idaho for the arrest of Mr. al-Kidd as a mate-

rial witness pursuant to 18 U.S.C. § 3144. According to the government, Mr. al-Kidd had "crucial" information germane to Mr. Al-Hussayen's criminal trial.

47. United States Magistrate Judge Williams approved the application and issued the material witness arrest warrant for Mr. al-Kidd on March 14, 2003, the same day as the government's request.

48. The material witness application submitted for Mr. al-Kidd's arrest was based on a 3-page affidavit executed by FBI Agent Mace. The affidavit stated that Agent Mace relied on facts acquired and supplied by FBI Agent Gneckow and other law enforcement officials. Agents Mace and Gneckow are Defendants in this action.

49. The affidavit consisted of only three sentences directly pertaining to whether Mr. al-Kidd's testimony could be secured voluntarily or by subpoena, without the need for arrest:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.
>
> * * *
>
> It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

See Affidavit at ¶¶ 7, 8 (Attached as Addendum A).

50. The affidavit, on its face, wholly failed to establish probable cause that Mr. al-Kidd's testimony could not be secured voluntarily or by subpoena, without the need for arrest.

51. Defendants Mace and Gneckow knew or reasonably should have known that the affidavit wholly failed to establish probable cause that Mr. al-Kidd would decline to testify voluntarily, or pursuant to a subpoena, without the need for arrest. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard in submitting this legally deficient affidavit.

52. Defendants Mace and Gneckow also knew or reasonably should have known that the affidavit contained false, material information. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard in including this false, material information.

53. Among these false, material statements was that Mr. al-Kidd had a one-way, first-class ticket to Saudi Arabia costing approximately $5,000. In fact, Mr. al-Kidd's ticket was a coach-class ticket costing approximately $1,700. Furthermore, the government later conceded that additional investigation revealed that Mr. al-Kidd's ticket was not a one-way ticket, but a round-trip ticket.

54. Further, Defendants Mace and Gneckow knew or reasonably should have known that the affidavit omitted material information, and they acted intentionally and/or with reckless disregard in failing to include this information. Among other things, Defendants Mace and Gneckow did not inform the Court of the following material information about which they knew or reasonably should have known:

(a) Mr. al-Kidd was a native-born United States citizen and a graduate of the University of Idaho;

(b) Mr. al-Kidd had a wife, child, parents and siblings who were native-born United States citizens living in this country;

(c) Mr. al-Kidd had talked with the FBI on several occasions prior to his arrest, either in-person or on the phone, and had answered dozens of questions for hours on a wide range of topics, that each of the in-person conversations had taken place at his mother's home (where Mr. al-Kidd was living at the time), and that Mr. al-Kidd had never failed to show up to these prearranged meetings;

(d) Prior to his arrest, Mr. al-Kidd had not heard from the FBI for approximately six months;

(e) At no time prior to his arrest did Defendants Mace or Gneckow, or any other government official, tell Mr. al-Kidd that he could not travel abroad or that he must consult with the government before he scheduled a trip abroad;

(f) At no time prior to his arrest did Defendants Mace, Gneckow, or any government official, tell Mr. al-Kidd that he would be needed as a witness in the Al-Hussayen trial (or any other proceeding) or ask him if he would agree to testify.

55. Mr. al-Kidd would have complied with a subpoena had he been issued one or agreed to a deposition, and Defendants Mace and Gneckow had no reasonable basis for believing otherwise. Similarly, Mr. al-Kidd would have voluntarily postponed his trip to Saudi Arabia and/or relinquished his passport had he been asked to do so, and Defendants Mace and Gneckow had no rea-

sonable basis for believing otherwise. Mr. al-Kidd would also have agreed to return from his trip when needed had he been asked to do so, and Defendants Mace and Gneckow had no reasonable basis for believing otherwise.

56. Defendants Mace and Gneckow sought a material witness warrant for Mr. al-Kidd for the purpose of detaining him preventively and/or for the purpose of further investigating him for possible criminal wrongdoing. Defendants Mace and Gneckow viewed Mr. al-Kidd as a criminal suspect, and not as a witness.

57. Upon information and belief, another material witness in the Al-Hussayen trial who was scheduled to travel to Saudi Arabia was not arrested and detained as a material witness, but only had his passport temporarily confiscated and was later permitted to travel to Saudi Arabia on the condition that he return for the trial. Unlike Mr. al-Kidd, this individual was not a United States citizen, but a Saudi national. Upon information and belief, there was no legitimate basis for treating Mr. al-Kidd differently than this individual; Mr. al-Kidd was treated differently, and arrested and detained because he was viewed as a potential criminal suspect.

58. In addition, the affidavit submitted in support of the material arrest warrant was facially unlawful on the separate and independent ground that it wholly failed to establish probable cause to believe that Mr. al-Kidd had testimony that was germane to Al-Hussayen's criminal proceeding. The affidavit stated that Mr. al-Kidd's testimony was "crucial" to the government's case (testimony which he was never called to provide). The affidavit, however, never precisely explained what information Mr. al-Kidd possessed that was germane to the charges

then pending against Al-Hussayen (visa fraud and making false statements to the government). Instead, the affidavit contained largely irrelevant information or statements attempting to cast Mr. al-Kidd in a suspicious light.

59. Defendants Mace and Gneckow knew or reasonably should have known that the affidavit wholly failed to establish probable cause to believe Mr. al-Kidd had germane testimony. Further, the affidavit was materially misleading and omitted material information. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard to the omissions and the materially misleading nature of the affidavit, and also in submitting a facially invalid affidavit.

60. Among other things, the affidavit stated that Mr. al-Kidd had material information because he or his wife received payments from Al-Hussayen and Al-Hussayen's "associates in excess of $20,000.00." In fact, Defendants Mace and Gneckow knew or reasonably should have known that Mr. al-Kidd worked for the same charitable Islamic organization as Mr. Al-Hussayen for a considerable period of time and received a salary for his work. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard in omitting this material information.

61. Defendants Mace and Gneckow acted under color of law in preparing and executing the affidavit in support of the material witness application in Mr. al-Kidd's case.

62. Defendants Mace and Gneckow acted intentionally, knowingly, and/or with reckless disregard to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful arrest and detention.

63. Defendants Mace and Gneckow knew or reasonably should have known that the reasonably foreseeable consequences of their actions would result in the unlawful arrest of Mr. al-Kidd, and, especially in the aftermath of September 11, 2001, would also subject Mr. al-Kidd to prolonged, punitive and excessive unlawful, and unconstitutional conditions of confinement, and to punishment without due process. In particular, Defendants Mace and Gneckow knew or reasonably should have known the way in which Muslim men, arrested on material witness warrants after September 11, 2001, were treated upon arrest and detention. *See infra* §§ 108-36. Defendants Mace and Gneckow further knew or reasonably should have known that their actions in securing Mr. al-Kidd's arrest would set into motion a series of events, the reasonably foreseeable outcome of which was the prolonged, excessive, punitive and unlawful detention of Mr. al-Kidd.

64. Defendants Mace and Gneckow bear legal responsibility for Mr. al-Kidd's unlawful and punitive arrest; Mr. al-Kidd's prolonged, excessive and unlawful detention; and the punitive, excessive and unlawful conditions of his detention and post-release restrictions, in violation of statutory and constitutional law.

Mr. al-Kidd's Arrest

65. On March 16, 2003, two days after the warrant was issued, FBI agents arrested Mr. al-Kidd as a material witness at Dulles International Airport in Virginia while he was at the ticket counter checking in for his flight.

66. Mr. al-Kidd was handcuffed. The agents did not provide him with Miranda warnings. The agents also

did not provide him with a copy of the arrest warrant at that time.

67. After his arrest at the ticket counter, the FBI agents walked Mr. al-Kidd in handcuffs through the airport, as onlookers stared at him. Mr. al-Kidd was wearing religious clothing, making it clear that he was a Muslim man whom the government was arresting, adding to the already extensive and unnecessary humiliation. Mr. al-Kidd was then driven, in handcuffs, to a police substation at the airport, where he was placed in a holding cell.

68. Upon information and belief, Mr. al-Kidd spent approximately 1-2 hours in the holding cell. He was then brought to an interrogation room, where he was informed that he did not have to talk, but that if he cooperated the matter might be resolved quickly and he could continue on his flight. Mr. al-Kidd agreed to talk and was interrogated at length. The agents questioned Mr. al-Kidd about a variety of topics, including his beliefs, conversion to Islam, and his travels.

69. After the interrogation, Mr. al-Kidd was again handcuffed and taken to the Alexandria Detention Center in Virginia.

Detention Conditions

70. Mr. al-Kidd was ultimately detained for 16 days, until his release in Boise on March 31, 2003. During this time, he was held in three different facilities: the Alexandria Detention Center in Virginia, the Federal Transfer Center in Oklahoma, and the Ada County Jail in Boise, Idaho. In each facility, he was treated as if he were a terrorist suspect, rather than a witness, and sub-

jected to humiliating, punitive and excessively harsh conditions and restrictions of his liberty.

71. When Mr. al-Kidd was transferred between detention centers, he was likewise treated as if he were a terrorist suspect, rather than a witness, and subjected to humiliating, punitive and excessively harsh conditions and restrictions of his liberty.

Alexandria Detention Center

72. At the Alexandria Detention Center in Virginia, Mr. al-Kidd was initially detained in a holding cell for approximately three days with a cell mate. The small cell contained only one bed, with a toilet beside the bed. Consequently, Mr. al-Kidd slept on the floor, near the toilet. He was forced to curl up or move to the corner of the cell whenever his cell mate used the toilet. For a significant period of time, the toilet was clogged, creating a strong stench in the small cell. Mr. al-Kidd ate all his meals in the cell and was not given an opportunity to shower. Upon information and belief, Mr. al-Kidd's cell mate was not a witness, but a criminal defendant.

73. After approximately three days in the holding cell, Mr. al-Kidd was strip-searched and transferred to a high-security unit of the jail. Mr. al-Kidd was told that he was being held in the same cell where John Walker Lindh and Zacarias Moussaoui, two individuals who have been charged with terrorist offenses by the United States, had been detained.

74. Mr. al-Kidd spent the next five days in a small cell in the high-security unit of the Alexandria Detention Center. The cell had only a food slot, whereas the other cells had a small glass-covered window allowing prison-

ers to see out of their cells. Mr. al-Kidd was allowed out of his cell for approximately 1-2 hours per day.

75. Upon information and belief, many, if not most, of the other inmates in this high-security unit had been charged with or convicted of serious crimes.

76. Upon information and belief, Mr. al-Kidd's brother-in-law attempted to visit him twice at the Alexandria facility and on both occasions detention guards refused to allow him to see Mr. al-Kidd. There was no legitimate reason for refusing both of these requests.

77. During the time Mr. al-Kidd was held at the Alexandria facility, he received a hearing in the United States District Court for the Eastern District of Virginia but was not provided with counsel for that initial hearing. At the hearing, held on March 17, the government moved to continue his detention without bond until he could be transferred to Idaho. United States Magistrate Judge Liam O'Grady asked whether Mr. al-Kidd wanted to have his detention hearing in the Eastern District of Virginia within the next three days or instead be transferred to Boise, Idaho for the hearing. The Magistrate Judge further advised Mr. al-Kidd that it might be in his interest to be transferred to Boise where people were more familiar with his case. Mr. al-Kidd expressed concern about how long it would take to have his hearing in Idaho, but was told by the government attorney that he would be transferred as quickly as possible. Without the aid of an attorney and feeling overwhelmed, Mr. al-Kidd agreed to be transferred to Boise on the assumption that the transfer would occur quickly. Mr. al-Kidd was not transferred to Idaho until March 25, 9 days after his arrest and more than one week after the hearing.

78. Without undue burden, Mr. al-Kidd could have been transferred to Idaho more expeditiously than he was. There was no legitimate reason for the long delay in transferring Mr. al-Kidd to Idaho.

79. Defendant Dunning, while Sheriff and acting under color of law, had ultimate responsibility and oversight for the unlawful, excessive, and punitive manner in which Mr. al-Kidd was held in the Alexandria facility.

80. Defendant Dunning, while Sheriff, knew or should have reasonably known that Mr. al-Kidd was being subjected to unlawful, excessive, and punitive detention conditions.

81. Defendant Dunning, while Sheriff, acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful, excessive, and punitive detention conditions.

82. There was no legitimate reason for the excessive and punitive conditions under which Mr. al-Kidd was detained. Defendant Dunning, without undue burden, could have detained Mr. al-Kidd under less restrictive conditions.

Oklahoma Federal Transfer Center

83. On March 24, 2003, eight days after his arrest, Mr. al-Kidd was transported to Oklahoma. Federal agents handcuffed his hands and legs, chained his waist, and then linked his waist chain to his ankles and a box on his hands, which was padlocked.

84. Federal agents then escorted Mr. al-Kidd in shackles to an airfield and onto a special "Con Air" plane with approximately 100 other detainees. He remained

shackled for the entire trip to the Federal Transfer Center in Oklahoma.

85. Upon information and belief, many of the other detainees on the plane had been charged with or convicted of serious offenses.

86. At the Oklahoma Federal Transfer Center, Mr. al-Kidd and the other detainees from the plane were brought to a large room. After a considerable wait, Mr. al-Kidd was singled out and brought to wait in a dark room by himself, while the other detainees were brought to another part of the facility for processing. Mr. al-Kidd was then transferred to a cell, made to remove his clothes and forced to sit completely naked for a considerable period of time, where he could be seen by guards, including at least one female guard, and other detainees, who were clothed and being processed. Mr. al-Kidd remained naked in his holding cell until other detainees had been processed. Eventually he was given clothes and processed.

87. After he was processed, Mr. al-Kidd was placed in a high-security Special Housing Unit of the facility. He was told he was being placed there because of his situation.

88. Defendant Callahan, while Warden and acting under color of law, had responsibility and oversight for the unlawful, excessive, and punitive manner in which Mr. al-Kidd was held in his facility.

89. Defendant Callahan, while Warden, knew or should have reasonably known that Mr. al-Kidd was being subjected to unlawful, excessive, and punitive detention conditions.

90. Defendant Callahan, while Warden, acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful, excessive, and punitive detention conditions.

91. There was no legitimate reason for the excessive and punitive conditions under which Mr. al-Kidd was detained. Defendant Callahan, without undue burden, could have detained Mr. al-Kidd under less restrictive conditions.

Ada County Jail

92. On March 25, 2003, Mr. al-Kidd was again shackled and transferred to Boise, Idaho. During the flight, Mr. al-Kidd asked to have his handcuffs loosened slightly. His request was denied, even though others on the plane were allowed to have their handcuffs loosened. When Mr. al-Kidd tried to go to the bathroom, he was unable to do so because his handcuffs were too tight and the officer on the plane would not loosen them. According to the officer on the flight, Mr. al-Kidd could not have his handcuffs loosened because his case was special.

93. When Mr. al-Kidd arrived in Boise on March 25, he remained handcuffed and shackled while he was transferred to a holding cell in the United States District Court. Mr. al-Kidd then met with a lawyer from the Federal Public Defender's office in Idaho for a brief period before he was scheduled to appear in court.

94. At the hearing, the government requested a three-day continuance. The government also asked that Mr. al-Kidd's detention be continued without bail, as-

serting that he posed a danger and that there was a risk he would flee. Mr. al-Kidd's assigned public defender also sought some additional time to review the case with his client. The Court ultimately granted a two-day continuance and scheduled a hearing for March 27. Mr. al-Kidd was then transported to the Ada County Jail.

95. Mr. al-Kidd was placed in a high-security unit of the prison, where he was housed in a cell with a glass wall that was infested with ants. Unlike the other cells in his wing, Mr. al-Kidd's cell remained light 24 hours a day. Mr. al-Kidd was only allowed out of his cell for approximately one hour per day. Mr. al-Kidd spent approximately five days in this cell.

96. Defendant Killeen, while Sheriff, and acting under color of law, had ultimate legal responsibility and oversight for the unlawful, excessive, and punitive manner in which Mr. al-Kidd was held in his facility.

97. Defendant Killeen, while Sheriff, knew or should have reasonably known that Mr. al-Kidd was being subjected to unlawful, excessive, and punitive detention conditions.

98. Defendant Killeen, while Sheriff, acted intentionally, knowingly, with reckless disregard and/or deliberate indifference to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful, excessive, and punitive detention conditions.

99. There was no legitimate reason for the excessive and punitive conditions under which Mr. al-Kidd was detained. Defendant Killeen, without undue burden, could have detained Mr. al-Kidd under less restrictive conditions.

100. During the time Mr. al-Kidd was detained in Idaho, FBI Director Mueller told a House Subcommittee that the government was making progress in the fight against terrorism and that there had been more than 200 "suspected terrorists . . . charged with crimes, 108 of whom have been convicted to date." The Director then offered a number of examples of the government's recent successes. The Director's first example was the capture of Khalid Shaikh Mohammed, the supposed mastermind of the September 11 attacks. His second example was the arrest of Mr. al-Kidd, after which he listed individuals who had been criminally charged with terrorism-related offenses. The Director's testimony never mentioned that Mr. al-Kidd had been arrested as a witness, and not on criminal charges, leaving little doubt that the government viewed Mr. al-Kidd as a suspect whom it wished to investigate and detain preventively. *See* Hearing of the House Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies, March 27, 2003. In April 2003, the Director repeated this testimony about Mr. al-Kidd before a Senate Subcommittee. *See* Hearing of the Senate Subcommittee on Commerce, Justice, State and the Judiciary, April 10, 2003.

Detention Hearing and Release Conditions

101. On March 28, 2003, Defendant Gneckow, FBI agent Joseph Cleary, and a United States Attorney interviewed Mr. al-Kidd at the Ada County Detention Center in the presence of Mr. al-Kidd's attorney from the Public Defender Service. Mr. al-Kidd was again questioned about his conversion to Islam, his beliefs

about Islam, his activities, his travels and his associations with Al-Hussayen.

102. During the meeting, Mr. al-Kidd repeated once again his willingness to cooperate and assured the government that he would make himself available for subpoena and appear at any time that he was requested to do so. The government ultimately proposed that he be released only under strict conditions.

103. Fifteen days after his arrest, on March 31, 2003, the Court ordered Mr. al-Kidd released on conditions. Among other things, the Court ordered that Mr. al-Kidd be released into the custody of his wife (who was living at her parents' home in Nevada). The Court confiscated his passport, barred him from applying for a new one, and limited his travel to Nevada and three other states. He was required to report to a probation officer in Idaho and Nevada, and subjected to home visits throughout his period of supervision.

104. For the next thirteen and one-half months, Mr. al-Kidd lived under conditions imposed by the Court.

105. After almost a year of living in these restrictive conditions, Mr. al-Kidd's marriage began to fall apart. In March 2004, Mr. al-Kidd moved to modify his release conditions because his living conditions had become unbearable and he and his wife were separating. The Court granted the motion and allowed him to secure his own residence in Las Vegas, Nevada.

106. On June 10, 2004, a jury acquitted Sami Omar Al-Hussayen on the most serious charges (added in superceding indictments) and failed to reach a verdict on the remaining lesser charges. The government never

called Mr. al-Kidd to testify at the trial and never retried Al-Hussayen.

107. At the conclusion of the trial, the government did not move to have Mr. al-Kidd's release conditions lifted. Accordingly, Mr. al-Kidd filed a motion to do so, which the Court granted, dismissing him as a material witness.

Defendant Ashcroft and the Post-9/11 Material Witness Policies and Practices

108. Defendant Ashcroft bears legal responsibility for Mr. al-Kidd's unlawful and punitive arrest; Mr. al-Kidd's prolonged, excessive, and unlawful detention; and the punitive, excessive and unlawful conditions of his detention and post-release restrictions.

109. The harm and legal wrong suffered by Mr. al-Kidd was a product of, and caused by, the Justice Department and Defendant Ashcroft's post-9/11 material witness policies and practices.

110. Prior to September 11, 2001, the Justice Department used the material witness statute sparingly and under narrow circumstances with United States citizens.

111. After September 11, 2001, the Justice Department and Defendant Ashcroft routinely used the material witness statute in numerous new, unlawful ways, especially against Muslim and/or Arab men. First, and foremost, the government used the statute as a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or to investi-

gate for possible criminal wrongdoing (*i.e.*, to arrest "suspects").

112. Pursuant to this new, unlawful use of the Justice Department's material witness powers, Defendants' purpose in arresting and detaining Mr. al-Kidd was not to secure his testimony, but to preventively hold and investigate him for possible criminal wrongdoing, as evidenced by various actions, including Director Mueller's House and Senate testimony; the fact that Mr. al-Kidd was not given the opportunity to cooperate voluntarily before being arrested; the manner in which Mr. al-Kidd was detained; the fact that he was routinely shackled when transported; the fact that the government opposed his release from detention on the ground that he was a danger to the community; the fact that he was under surveillance prior to his arrest; the types of questions he was routinely asked during FBI interrogations; statements by the FBI and other government agents in the media; the nature of his release conditions; and the fact that he was never called to testify.

113. The post-9/11 material witness policies and practices adopted and implemented by Defendant Ashcroft were part of a broader set of policies and practices concerning individuals whom the government lacked probable cause to arrest on criminal charges but wished to hold preventively and/or to investigate for criminal wrongdoing.

114. According to an internal report issued by the Justice Department's Office of Inspector General, Defendant Ashcroft issued a memorandum shortly after September 11, 2001, directing federal law enforcement personnel to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to,

terrorist activities." *See* "The September 11th Detainees," April 2003 ("OIG Report") at 1. On October 25, 2001, Defendant Ashcroft delivered a speech to the United States Conference of Mayors in which he said, "It has been and will be the policy of this Department of Justice to use . . . aggressive arrest and detention tactics in the war on terror." *See* OIG Report at 12.

115. After September 11, 2001, the government's aggressive arrest and detention policies and practices led to numerous non-citizens being preventively detained on immigration charges and U.S. citizens and non-citizens being preventively detained on garden-variety criminal charges. *See* OIG Report at 12-13.

116. As a fundamental component of this broader detention policy, Defendant Ashcroft also developed, implemented and set into motion a policy and/or practice under which the FBI and DOJ would use the material witness statute to arrest and detain terrorism *suspects* about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further.

117. Defendant Ashcroft stated at an October 31, 2001 press briefing, "Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist aliens. These measures form one part of the department's concentrated strategy to prevent terrorist attacks by taking *suspected terrorists* off the street . . . Aggressive *detention* of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying new attacks" (emphasis added).

118. An internal DOJ document, discussed in the OIG Report, echoes the theme of using the material wit-

ness statute to arrest and hold suspects, rather than to secure testimony. The document, entitled "Maintaining Custody of Terrorism *Suspects*," includes the following statement: "If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or *pursuant to a material witness warrant*." *See* OIG Report at 38-39 (emphasis added).

119. The OIG Report also refers to a statement by a Senior Counsel in the Deputy Attorney General's Office noting that the "Criminal Division is examining each of the cases [of terrorist *suspects* in INS custody] to determine whether the person can be detained on criminal charges or on a *material witness* warrant if the person is ordered released from INS custody." *See* OIG Report at 75 (emphasis added).

120. Public statements by other top officials who worked closely with the Justice Department in the development of post-9/11 policies confirm the new material witness policies and practices. For example, Mary Jo White, the U.S. Attorney for the Southern District of New York in the years immediately preceding and following September 11, 2001, stated that "[s]ome of the criticism that has been leveled at [DOJ for its post-9/11 use of the material witness statute] is not wholly unjustified. . . . Does it really sort out to being in one sense preventative detention? Yes, it does, but with safeguards." *See* Adam Liptak, "Threats and Responses: The Detainees; For Post-9/11 Material Witness, It Is a Terror of a Different Kind," *New York Times*, August 19, 2004.

121. Michael Chertoff, the head of the DOJ's Criminal Division in the years immediately following Septem-

ber 11, 2001, was a major proponent of the aggressive detention policy and publicly highlighted the DOJ's use of the material witness statute, saying, "It's an important investigative tool in the war on terrorism. . . . Bear in mind that you get not only testimony—you get fingerprints, you get hair samples—so there's all kinds of *evidence* you can get from a witness." *See* Steve Fainaru and Margot Williams, "Material Witness Law Has Many In Limbo," *Washington Post*, November 24, 2002 (emphasis added).

122. In an April 19, 2002 speech to the Commonwealth Club of California, FBI Director Robert Mueller stated, "[A] number of *suspects* were detained on federal, state, or local charges; on immigration violations; or on *material witness* warrants" (emphasis added).

123. On February 24, 2004, in a statement to the ABA Committee on Law and National Security, then White House Counsel Alberto Gonzales described standard DOJ procedure for handling a terrorism suspect: "In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a *material witness*, and detention as an enemy combatant" (emphasis added).

124. On June 25, 2003, David Nahmias, Counsel to the Assistant Attorney General, Criminal Division, offered the Senate Judiciary Committee an example of how the DOJ tracked down an alleged terrorist: "[W]e developed . . . clear evidence that he had contact with

an AL Qaida terrorist operative connected to 9/11. And so in December he was approached again . . . and [when] we weren't able to clear things at that point, he was actually made a material witness." Nahmias stated that "we got enough information to at least make him a material witness and then to charge him criminally."

125. Pursuant to its post-9/11 policies and practices, the Justice Department has in fact used the material witness statute for the unlawful purpose of arresting, holding, and interrogating numerous individuals about whom it did not have sufficient evidence to arrest on criminal charges but wished to investigate further and/or detain preventively.

126. Under the post-9/11 policies and practices, some individuals were designated as material witnesses only after already being arrested on another ground, further indicating that the government was using material witness warrants as a means of prolonging a suspect's detention. *See* Steve Fainaru and Margot Williams, "Material Witness Law Has Many In Limbo," *Washington Post*, November 24, 2002 (describing a material witness who was first arrested on trespassing charges after a motel clerk reported to the authorities that he looked suspicious).

127. Under the post-9/11 policies and practices, individuals have also been impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena. Some individuals have been arrested as material witnesses despite the fact that they had voluntarily approached the FBI to discuss information they might have, or willingly agreed to talk to the government when

asked. *See* Naftali Bendavid, "Material Witness Arrests Under Fire; Dozens Detained In War On Terror," *Chicago Tribune*, December 24, 2001 (describing a material witness arrested and detained for three days in solitary confinement after willingly and voluntarily allowing the FBI to search his business records and computers).

128. Under the post-9/11 policies and practices, numerous material witnesses who have been detained to secure their supposedly important testimony were never in fact called to testify. By one account, nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify. *See* Steve Fainaru and Margot Williams, "Material Witness Law Has Many In Limbo," *Washington Post*, November 24, 2002. The former Chief of the Criminal Division in the U.S. Attorney's office in Miami has commented that the fact that so many post-9/11 material witnesses were never called to testify "would tend to indicate that the use of the material witness statute was more of a ruse than an honest desire to record the testimony of that person." *Id.* Further confirming their actual status as suspects, rather than witnesses, the government refused to grant many post-9/11 material witnesses immunity for their testimony, although this traditionally has been a standard procedure for eliciting testimony from a witness.

129. Once arrested, material witnesses have been routinely held in high security detention conditions, further highlighting their status as terrorism suspects, rather than true witnesses. At the San Diego Metropolitan Correctional Center, for example, there was an order in place that "material witnesses would not be allowed to make phone calls." *United States v. Awadal-*

lah, 202 F. Supp. 2d 55, 60 (S.D.N.Y. 2002) (quoting hearing transcript), *rev'd on other grounds*, 349 F.3d 42 (2d Cir. 2003) (not reaching issues related to detention conditions). At the New York City Metropolitan Correctional Center (MCC), material witnesses were deemed guilty until proven innocent: "'[T]he warden determined that until [the MCC] had any concrete evidence from the FBI or other folks, that there was not a terrorist association or anything of that nature, that [the MCC] would have to keep [the material witnesses] separate[]' and special precautions would apply." *Id.* at 60-61 (quoting hearing transcript).

130. Further, all material witnesses at the New York City MCC detained in relation to September 11, 2001, had their movements recorded with a hand-held camera. *Id.* at 61 (quoting hearing transcript: "It was also decided 'early on' that '[w]ith respect to all of the folks who were being brought in as material witnesses and under investigation for the World Trade Center attacks . . . that [the MCC] would record their movements with a hand-held camera,' a policy that the prison had previously used with the 'African Embassy bombers'"). U.S. Deputy Marshal Scott Shepard stated that "[M]y understanding is that our office treats anyone who is brought in as a material witness regarding the September 11 or any of the other embassy bombing trial[s], or anything like that, is treated as a security risk.'" *Id.* at 60 n.7 (quoting hearing transcript).

131. According to the OIG Report, a federal official noted that after September 11, 2001, the DOJ's Bureau of Prisons often "did not distinguish between detainees who . . . posed a security risk and those detained

aliens who were uninvolved witnesses." *See* OIG Report at 20.

132. There was a general policy that all inmates, including material witnesses, "who were at the New York MCC in connection with the investigation into the September 11th terrorist attacks were designated high-security inmates and handled in accordance with the procedures for such inmates." *United States v. Awadallah*, 202 F. Supp. at 60 (quoting Government Memorandum). *See also* Steve Fainaru, "Suspect Held Eight Months Without Seeing Judge," *Washington Post*, June 12, 2002 (noting that one material witness was held in the Special Housing Unit of the Brooklyn MDC, only allowed out of his cell for a half-hour per day and shackled with leg irons and his hands bound to his waist when he was transported).

133. The Justice Department has also unreasonably prolonged the period of detention for material witnesses—by the DOJ's own estimates about half of the witnesses it arrested in terrorism investigations were detained for more than thirty days. *See* DOJ letter to Congressmembers Sensenbrenner and Conyers of the House Committee on the Judiciary, May 13, 2003.

134. Even after being released from detention, many material witnesses have been subjected to impermissibly restrictive release conditions—and yet were still never called to testify. *See, e.g.*, William Kates, "Man Held As Witness In Probe of Charity," *Albany Times Union*, March 5, 2003 (reporting that a material witness released on $20,000 bail was subjected to restrictive conditions that required him to remain confined to his home, wear an electronic monitoring bracelet, and surrender his passport).

135. DOJ has also acted under a cloak of secrecy, routinely requesting that records of material witness proceedings be sealed and refusing to make public the most basic information about the material witnesses it has detained, including names or other identifying information, or the exact number of witnesses, even in the face of direct congressional inquiry. In a response to inquiries from members of the House Judiciary Committee, the Acting Assistant Attorney General refused to reveal specific information, making only vague statements such as that "fewer than 50" individuals had been detained as material witnesses in the September 11 investigations as of January 2003, about half of whom were detained for more than 30 days. *See* DOJ letter to Congressmembers Sensenbrenner and Conyers of the House Committee on the Judiciary, May 13, 2003.

136. The abuses occurring under the material witness statute after September 11, 2001, were highly publicized in the media, congressional testimony and correspondence, and in various reports by governmental and non-governmental entities. Defendant Ashcroft (and the other Defendants) knew or reasonably should have known about these abuses. Upon information and belief, the Justice Department has issued apologies to 10-12 individuals who were improperly arrested as material witnesses.

137. Defendant Ashcroft bears legal responsibility for the harm caused Mr. al-Kidd. While he was the Attorney General, Defendant Ashcroft, acting under color of law, was legally responsible for the Justice Department's post-9/11 material witness policies and practices. Defendant Ashcroft was a principal architect of, authorized and set into motion, these policies and practices

regarding the material witness statute, and had responsibility for their implementation and administration. Defendant Ashcroft was also legally responsible for taking any necessary corrective action in light of the mounting evidence of abuse.

138. Defendant Ashcroft knew or reasonably should have known of the unlawful, excessive, and punitive manner in which the federal material witness statute was being used in the aftermath of September 11, 2001. Defendant Ashcroft knew or reasonably should have known that the manner in which the material witness statute was being used would foreseeably result in the unlawful arrest and detention of material witnesses (such as Mr. al-Kidd), and would also foreseeably subject such individuals (such as Mr. al-Kidd) to unreasonable and unlawful use of force, to unconstitutional conditions of confinement, and to punishment without due process.

139. Defendant Ashcroft knew or should have known that corrective action was necessary to prevent the material witness policies and practices, once adopted and implemented, from causing additional and ongoing legal harm and constitutional violations.

140. Defendant Ashcroft's actions were a proximate cause of the reasonably foreseeable legal wrongs suffered by Mr. al-Kidd, including Mr. al-Kidd's unlawful arrest, and the length and conditions of his detention.

141. Defendant Ashcroft, in creating, overseeing, and implementing these unlawful, excessive, and punitive policies and/or practices, acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference, towards the constitutional and legal rights of individuals arrested and detained under the policies

and/or practices (including Mr. al-Kidd). Further, Defendant Ashcroft acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference, towards the constitutional and legal rights of material witnesses arrested and detained under the Justice Department's post-9/11 policies and/or practices in failing to take corrective action.

Irreparable Harm Suffered by Mr. al-Kidd

142. There is a real and actual controversy between Plaintiff and Defendants, and Defendants' actions are the proximate cause of Plaintiff's injuries.

143. Mr. al-Kidd has suffered and continues to suffer harm, including irreparable harm, as a direct result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

144. Mr. al-Kidd's marriage slowly unraveled and he ultimately separated from his wife. He was unable to find steady employment after his life had been disrupted by the arrest. He was also deprived of the opportunity to study Islamic law and Arabic in Saudi Arabia on a scholarship.

145. As a result of his arrest, detention, and treatment during detention, Mr. al-Kidd has experienced severe and lasting emotional and mental distress including but not limited to fear, anxiety, nervousness, stress, depression, loss of reputation and humiliation.

146. Upon information and belief, Mr. al-Kidd has also faced, and will continue to face, adverse employment consequences because the government maintains

and disseminates information and records about his arrest and detention as a material witness.

147. In July 2004, Mr. al-Kidd was fired from his job with a contractor who did work on a United States Air Force base in Nevada. Upon information and belief, Mr. al-Kidd was denied a required security clearance because of his arrest and related records maintained by Defendants DOJ, FBI, DHS, and TSC in various databases and disseminated to Mr. al-Kidd's employers and others.

148. Upon information and belief, information and records concerning Mr. al-Kidd's material witness arrest and detention appear in several federal databases, including Defendant FBI's National Crime Information Center ("NCIC") database and the database operated by the Terrorist Screening Center ("TSC").

149. Upon information and belief, Mr. al-Kidd could be arrested and detained again as a material witness under the government's post-9/11 policies and practices.

COUNT ONE

VIOLATION OF THE MATERIAL WITNESS STATUTE AND BAIL REFORM ACT

(18 U.S.C. §§ 3142, 3144)

150. The foregoing allegations are re-alleged and incorporated herein by reference.

151. Mr. al-Kidd's arrest, detention and post-detention release conditions violated the material witness statute because, *inter alia*, (a) he was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony

was needed; (b) because there was no probable cause to believe his testimony could not be secured without arrest; (c) because there was no probable cause to believe Mr. al-Kidd had testimony germane to a criminal proceeding; and (d) because of the prolonged, excessive, and punitive conditions of Mr. al-Kidd's detention and post-release terms.

152. This count is against all Defendants.

COUNT TWO

VIOLATION OF THE FOURTH AMENDMENT

153. The foregoing allegations are re-alleged and incorporated herein by reference.

154. Mr. al-Kidd's arrest, detention and post-release conditions violated the Fourth Amendment to the United States Constitution because, *inter alia*, (a) he was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony was needed; (b) because there was no probable cause to believe his testimony could not be secured without arrest; (c) because there was no probable cause to believe Mr. al-Kidd had testimony germane to a criminal proceeding; (d) because of the prolonged, excessive, and punitive conditions of Mr. al-Kidd's detention and post-release terms; and (e) because of Defendants' unreasonable and unlawful searches, including strip searches.

155. This count is against all Defendants.

COUNT THREE

VIOLATION OF THE FIFTH AMENDMENT

156. The foregoing allegations are re-alleged and incorporated herein by reference.

157. The arrest and conditions under which Mr. al-Kidd was detained violated both the substantive and procedural components of the Fifth Amendment to the United States Constitution, as did the conditions governing his post-detention release, because, *inter alia*, (a) he was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony was needed; (b) because there was no probable cause to believe his testimony could not be secured without arrest; (c) because there was no probable cause to believe Mr. al-Kidd had testimony germane to a criminal proceeding; (d) because of the prolonged, excessive, and punitive conditions of Mr. al-Kidd's detention and post-release restrictions; and (e) because there was no individualized assessment, hearing, or proper process before Mr. al-Kidd was detained under high-security, excessive and punitive conditions.

158. This count is against all Defendants.

COUNT FOUR

UNLAWFUL ARREST AND DETENTION

(42 U.S.C. § 1983)

159. The foregoing allegations are re-alleged and incorporated herein by reference.

160. Defendants' actions violated Mr. al-Kidd's constitutional and legal rights to be free from unlawful ar-

rest and post-release conditions, and punitive and unconstitutional conditions of confinement and detention in violation of 42 U.S.C. § 1983 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

161. This claim is against all non-federal Defendants acting under color of law.

COUNT FIVE

UNLAWFUL MAINTENANCE OF RECORDS

(Expungement Action at Common Law)

162. The foregoing allegations are re-alleged and incorporated herein by reference.

163. Upon information and belief, Defendants Gonzales, FBI, Mueller, TSC, and Bucella have entered and presently maintain records related to Mr. al-Kidd's arrest and detention in the NCIC and TSC databases, respectively.

164. Upon information and belief, Defendants have entered and presently maintain records related to Mr. al-Kidd's arrest and detention in other databases and record systems.

165. The government may not retain records of arrests or detentions where the maintenance of such records would be fundamentally unfair, such as where the arrest or detention was illegal and unconstitutional.

166. Mr. al-Kidd's arrest and detention violated the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, 18 U.S.C. §§ 3142, 3144, and the FTCA.

167. Maintenance and dissemination of records of his arrest and detention is fundamentally unfair and unlawful.

COUNT SIX

UNLAWFUL MAINTENANCE OF RECORDS

(Expungement Action Under NCIC Statute, 28 U.S.C. § 534)

168. Upon information and belief, Defendants FBI, Mueller and Gonzales have entered and presently maintain records of Mr. al-Kidd's arrest and detention in the NCIC database.

169. Congress has authorized Defendant FBI to enter specified records into the NCIC database and disseminate them to prospective employers, law enforcement officials, and other public and private agencies.

170. Congress has not authorized the FBI to enter records of the arrest and detention of persons subject to material witness warrants into the NCIC database.

171. Defendant FBI's entry into the NCIC of records relating to the arrest and detention of Mr. al-Kidd pursuant to a material witness warrant is arbitrary, capricious, and not authorized by the NCIC statute, 28 U.S.C. § 534.

172. Mr. al-Kidd is entitled to declaratory and injunctive relief ordering that records related to his unlawful arrest and detention be expunged from the NCIC.

COUNT SEVEN

FEDERAL TORT CLAIMS ACT

(28 U.S.C. §§ 2671, 1346)

173. The foregoing allegations are re-alleged and incorporated herein by reference.

174. Defendants Ashcroft, Mace, and Gneckow violated the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671, 1346, by falsely and tortiously arresting and imprisoning Mr. al-Kidd without legal justification. These Defendants acted with malice and/or criminal intent and wrongfully, unlawfully and/or wantonly and maliciously arrested and imprisoned Mr. al-Kidd. These Defendants further acted without just or probable cause.

175. Defendant Ashcroft further violated the FTCA by intentionally, recklessly and/or negligently establishing, promulgating and enforcing the unlawful policies and practices which caused Mr. al-Kidd to be unlawfully and tortiously arrested and punitively detained. Defendant Ashcroft further acted wantonly and maliciously and with malice and/or criminal intent in establishing, promulgating and enforcing the unlawful policies and practices which caused Mr. al-Kidd to be unlawfully arrested and detained. Defendant Ashcroft further acted without just or probable cause in establishing, promulgating and enforcing these unlawful policies and practices.

176. Defendants Callahan and Ashcroft further violated the FTCA by intentionally, recklessly and/or negligently establishing, promulgating and enforcing the unlawful policies and practices which caused Mr. al-Kidd

to be subjected to prolonged, excessive, punitive, harsh and unreasonable detention and post-release conditions. Defendants Callahan and Ashcroft further acted wantonly, maliciously and/or with criminal intent in establishing, promulgating and enforcing the unlawful policies and practices. Defendants Callahan and Ashcroft further acted without just or probable cause in establishing, promulgating and enforcing the unlawful policies and practices.

177. Defendants Ashcroft (as Attorney General), Mace (as an FBI agent), Gnecknow (as an FBI agent), and Callahan (as a federal warden) were acting within the course and scope of their employment as agents of the United States, and on behalf of the United States, when they committed the tortious and unlawful acts complained of here.

RELIEF

WHEREFORE, Plaintiff respectfully requests relief as follows:

178. A declaration that Defendants' actions violated the Constitution; 42 U.S.C. § 1983; the material witness and Bail Reform Act statutes, 18 U.S.C. §§ 3142, 3144; the common law; and the FTCA.

179. A declaration that Defendants' actions, practices, customs, and policies, regarding the arrest and detention and release conditions of material witnesses, alleged herein were unjustified, illegal and violated the constitutional and legal rights of Abdullah al-Kidd.

180. Expungement of all records, fingerprints and notations relating to the unlawful arrest and detention of Mr. al-Kidd as a material witness.

181. Expungement of all FBI records or files in the NCIC, TSC and any other databases, that are unconstitutional, unlawful, or inaccurate.

182. Trial by jury.

183. Compensatory damages in an amount to be proven at trial.

184. Punitive damages in an amount to be proven at trial.

185. Costs and reasonable attorney fees.

186. Such other relief as the Court deems just and equitable.

DATED: Nov. 18, 2005.

Respectfully submitted,

THE ROARK LAW FIRM, LLP
HAMPTON & ELLIOTT
WOOLLEY & POGUE, PLLC

/s/ CYNTHIA WOOLLEY
CYNTHIA WOOLLEY
Attorney for Plaintiff

UNITED STATES DISTRICT
FOR THE DISTRICT OF IDAHO

No. 03-048-C-EJL

UNITED STATES OF AMERICA

v.

SAMI OMAR AL-HUSSAYEN, DEFENDANT

Filed: Mar. 14, 2002

APPLICATION FOR ARREST WARRANT OF MATERIAL WITNESS

The United States of America and Thomas E. Moss, United States Attorney for the District of Idaho, by and through Kim R. Lindquist, Assistant United States Attorney, with this Application for Arrest Warrant of Material Witness, and move the Court that an arrest warrant be issued for the following material witness: Abdullah Al-Kidd, a/k/a Lavoni T. Kidd.

On February 13, 2003, an Indictment was filed in United States District Court for the District of Idaho alleging violations of 18 U.S.C. §§ 1001(a) (1) and (2), and 3238—False Statement to the United States; and 18 U.S.C. §§ 1546(a), 3237 and 3238—Visa Fraud. As a result of said Indictment, a warrant of arrest for the defendant was issued.

The testimony of the aforementioned material witness is material to both the prosecution and the defendant herein.

There is a risk that unless the Court detains or imposes restrictions on the travel of said material witness, he will be unavailable at future proceedings in this case.

This application is further based upon the Affidavit of Scott Mace, Special Agent, Federal Bureau of Investigation, the Indictment filed herein, and the warrant of arrest against the defendant herein.

DATED this 14th of Mar., 2002.

THOMAS E. MOSS
United States Attorney
By

/s/ KIM R. LINDQUIST
KIM R. LINDQUIST
Assistant United States Attorney

STATE AND DISTRICT OF IDAHO
BOISE, IDAHO

No. 03-048-C-EJL

UNITED STATES OF AMERICA

v.

SAMI OMAR AL-HUSSAYEN, DEFENDANT

Filed: Mar. 14, 2003

AFFIDAVIT

I, SCOTT MACE, the undersigned, being duly sworn, depose and state as follows:

I am a Special Agent of the FBI currently assigned to the Boise, Idaho, Resident Agency of the Salt Lake City Division. I have been a Special Agent of the FBI for six years and have been involved in multiple investigations involving crimes under Title 18 of the United States Code. This Affidavit is based upon facts acquired by fellow FBI Special Agent Michael James Gneckow and other law enforcement officials pertaining to the investigation. On March 14, 2003, Special Agent Michael James Gneckow advised your affiant of the following:

1) Gneckow is a Special Agent with the Federal Bureau of Investigation (FBI), currently assigned to the Coeur d'Alene, Idaho Resident Agency, within the FBI's Salt Lake City Division. He has been a Special Agent

with the FBI for six (6) years and has ten (10) additional years of Federal law enforcement experience as a Special Agent with the U.S. Naval Criminal Investigative Service (NCIS). He has a Masters Degree in National Security Affairs and has spent the majority of his career investigating matters relating to the national security of the United States.

2) Based upon his own observation and those of other law enforcement officers involved in the subject investigation) this affidavit is made in support of an application for arrest warrant of a material witness, namely: Abdullah Al-Kidd, a/k1a Lavoni T. Kidd.

3) During the past 16 years Gneckow has been involved in dozens of investigations involving illegal activities such as terrorism and money laundering, including the Olympic Park Bombing in Atlanta and numerous investigations overseas. During the period of 1986 to 1996, he was assigned as a foreign counterintelligence/ international terrorism investigator with the United States Naval Criminal Investigative Service. For the past six years, as a Special Agent with the FBI, he has been assigned numerous terrorism investigations and has been involved in several search warrants, many of which were related to terrorism or terrorism-related matters. During his career with NCIS and the FBI, he has worked closely with agents and officers of many other agencies, including the CIA, DEA, ATF, Customs Service, IRS, FBI, INS and the various investigative/ intelligence components of the United States Armed Forces, concerning matters relating to the national security of the United States.

4) In addition to his personal experience as above-referenced, he has received specialized training in the

area of terrorism and counter-terrorism, as well as economic-based crime, by attending numerous seminars offered by the Department of Justice, FBI, and other agencies. He has also participated as an instructor in some of these seminars.

5) Gneckow is currently a member of the Inland Northwest Joint Terrorism Task Force and as such, works alongside other Federal, state and local law enforcement officers, including agents of the U.S. Immigration and Naturalization Service (INS) and other personnel who investigative document fraud by foreign nationals.

6) On February 13, 2003, an Indictment was filed in United States District Court for the District of Idaho alleging violations of 18 U.S.C. §§ 1001 (a)(1) and (2); and 3238—False Statement to the United States; and 18 U.S.C. §§ 1546(a), 3237 and 3238—Visa Fraud. During the course of that investigation, information was developed regarding the involvement of Abdullah Al-Kidd with the defendant. That information includes that from March 2000 to November 2001, an individual identified as Abdullah Al-Kidd, a/k/a Lavoni T. Kidd, and/or his spouse, Nadine Zegura, received payments from Sami Omar Al-Hussayen and his associates in excess of $20,000.00. Al-Kidd traveled to Sana'a, Yemen, in August 2001 and remained there until April 2002, when he returned to the United States. Upon his return to the United States, Al-Kidd traveled to Moscow, Idaho, and met with Al-Hussayen's associates. While in Moscow, Al-Kidd emptied a storage facility which contained personal items belonging to him. Among those personal items were documents Al-Kidd left behind, which included a conference program for the second annual IANA

conference in Dearborn, Michigan, in December 1994; a hotel receipt from Sacramento, California, dated 4/26/2001, in the name of Abdullah Al-Kidd, listing his company name as "Al-Multaqa;" and telephone numbers for IANA (734-528-0006) and Basem Khafagi (734-481-1930). Khafagi is a former Director of IANA and former University of' Idaho student (graduated in 1988) who was recently arrested in New York.

7) Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.

8) Due to Al-Kidd's demonstrated involvement with the defendant, Sami Omar Al-Hussayen, he is believed to be in possession of infonnation germane to this matter which will be crucial to the prosecution. It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

Respectfully submitted,

/s/ SCOTT MACE
SCOTT MACE
Special Agent
Federal Bureau of Investigation
Boise, Idaho

Subscribed and sworn to before me this 14th day of Mar. 2003.

/s/ MIKEL H. WILLIAMS
MIKEL H. WILLIAMS
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. CR-03-048-EJL

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMI OMAR AL-HUSSAYEN

Filed: Feb. 13, 2003

INDICTMENT

THE GRAND JURY CHARGES:

At all times pertinent to this Indictment:

VISA FRAUD AND FALSE STATEMENT

The Student Visas

Background

1. In order for a foreign student to study in the United States on an F-1 student visa the student must declare and promise under oath to United States authorities that the student seeks a presence in the United States **solely for the purpose of pursuing the student's course of studies**. In relation thereto, the foreign student must truthfully and fully declare his associations with organizations to the appropriate United States Government authorities in order for those authorities to

evaluate any such association and related activities in relation to the interests of the United States.

2. **SAMI OMAR AL-HUSSAYEN** was a citizen of Saudi Arabia. Between about August 7, 1994 and September 23, 1998, **AL-HUSSAYEN** studied in the United States as a foreign student. He studied at Ball State University in Muncie, Indiana, where he obtained a Masters of Science degree in computer science; and at Southern Methodist University in Dallas, Texas.

3. On or about September 23, 1998, **AL-HUSSAYEN** applied to the University of Idaho at Moscow, Idaho, by submitting an International Application Form requesting that he be admitted to the Computer Science PhD program for the Spring 1999 Semester.

4. In or about January, 1999, **AL-HUSSAYEN** was admitted to the Computer Science PhD program at the University of Idaho, with an emphasis on computer security and intrusion techniques. University of Idaho records indicated that he began his studies the Spring 1999 Semester. At the time he published his permanent address as 311 Sweet Ave., Apt. #6, Moscow, Idaho.

The year 1999 transactions

5. On or about May 17, 1999, United States Immigration and Nationalization (INS) Form I-20 was issued by the University of Idaho, allowing **AL-HUSSAYEN** to study in the Computer Science PhD program beginning no later than August 24, 1999, and ending no later than December 17, 2004.

6. On or about July 17, 1999, while outside the United States, **AL-HUSSAYEN** signed the Student Certifica-

tion of the INS Form I-20 at section #11, which read in pertinent part:

> I have read and agreed to comply with the terms and conditions of my admission. . . . I certify that all information provided on this form refers specifically to me and is true and correct to the best of my knowledge. I certify that I seek to enter or remain in the United States temporarily), **and *solely* for the purpose of pursuing a full course of study at [the University of Idaho]**. I also authorize the named school to release any information from my records which is needed. [Emphasis added.]

AL-HUSSAYEN falsely made said certification, knowing of his internet and business activities alleged hereafter. On or about July 20, 1999, the United States Government issued an F-1 student visa to **AL-HUSSAYEN** at Riyadh, Saudi Arabia. The visa was valid for twenty-four months, or until July 20, 2001. (See Counts One and Two hereafter.)

7. On or about August 11, 1999, **AL-HUSSAYEN** was admitted by the United States Government into the United States at John F. Kennedy International Airport in New York City, New York, as an F-1 student. **AL-HUSSAYEN** was admitted into the United States by the United States Government pursuant to the July 20, 1999 visa and in direct reliance upon **AL-HUSSAYEN**'s certification on the INS Form I-20 dated July 17, 1999. (See Count Three hereafter.)

The year 2000 transactions

8. On or about July 7, 2000, a second INS Form I-20 was issued by the University of Idaho and desig-

nated "for Continued attendance at this school" and in order "to add dependant." On or about this same day and in Moscow, Idaho, **AL-HUSSAYEN** signed the Student Certification of said INS Form I-20 at section #11 and which read in pertinent part:

> I have read and agreed to comply with the terms and conditions of my admission. . . . I certify that all information provided on this form refers specifically to me and is true and correct to the best of my knowledge. I certify that I seek to enter or remain in the United States temporarily, **and *solely* for the purpose of pursuing a full course of study at [the University of Idaho].** I also authorize the named school to release any information from my records which is needed. [Emphasis added.]

AL-HUSSAYEN falsely made said certification, knowing of his internet and business activities alleged hereafter. (See Counts Four and Five hereafter.) On or about July 9, 2000, **AL-HUSSAYEN** departed from the United States at the John F. Kennedy International Airport in New York City, New York.

9. On or about August 25, 2000, **AL-HUSSAYEN** was admitted into the United States by the United States Government at Washington, D.C., as an F-1 student. **AL-HUSSAYEN** was admitted into the United States by the United States Government pursuant to the student visa dated July 20, 1999 as previously referenced and in reliance upon **AL-HUSSAYEN**'s certification on the INS Form I-20 dated July 7, 2000. (See Count Six hereafter.)

The year 2002 transactions

10. On or about January 10, 2002, AL-HUSSAYEN departed the United States at the John F. Kennedy International Airport in New York City, New York. On or about January 13, 2002, AL-HUSSAYEN signed and submitted to the United States embassy a DOS Form DS-156 for the purpose of obtaining another F-1 student visa. Section 36 of the form reads in pertinent part:

> I certify that I have read and understand all the questions set forth in this application and the answers I have furnished on this form are true and correct to the best of my knowledge and belief. I understand that any false or misleading statement may result in the permanent refusal of a visa or denial of entry into the United States. I understand that possession of a visa does not automatically entitle the bearer to enter the United States of America upon arrival at a port of entry if he or she is found inadmissable.

At section nineteen of the Form DS-156, AL-HUSSAYEN stated that the purpose of his entry into the United States was to "study;" and, at section twenty-six, that he would do so at the University of Idaho. At section 20 he stated his permanent address in the United States to be 311 Sweet Ave. #6, Moscow, Idaho, 83843. As part of his application for the F-1 student visa, AL-HUSSAYEN relied upon and/or submitted the INS Form I-20 dated July 7, 2000, as previously referenced.

11. On or about January 14, 2002, the DOS Form DS-156 was formally stamped as received by the United States Government at the United States Embassy in

Riyadh, Kingdom of Saudi Arabia. However, the application was refused because the birth date of **AL-HUSSAYEN** on the visa application and the July 7, 2000 INS Form I-20 did not match the birth date on his passport.

12. On or about January 14, 2002, and in conjunction with the same F-1 student visa application, **AL-HUSSAYEN** submitted a DOS Form DS-157 Supplemental Non-immigrant Visa Application to the United States Government at the United States Embassy in Riyadh, Kingdom of Saudi Arabia, which DOS Form DS-157 was attached to the original DOS Form DS-156 submitted on January 14, 2002. Section 13 of the DOS Form DS-157 required the applicant to "[l]ist all Professional, Social, and Charitable Organizations to Which You Belong (Belonged) or Contribute (Contributed) or with Which You Work (Have Worked)." **AL-HUSSAYEN** listed "ACM & IEEE." ("ACM" stands for the Association for Computive Machinery, and "IEEE" stands for the Institute of Electrical and Electronic Engineers.) **AL-HUSSAYEN** listed no other affiliations. **AL-HUSSAYEN** falsely and intentionally did not list the Islamic Assembly of North America (hereafter the IANA) and other entities. (See Counts Seven and Eight hereafter.)

13. On or about March 19, 2002, the University of Idaho provided an INS Form I-20 for **AL-HUSSAYEN** "for Continued attendance at this school" and to "correct birth-date." On or about April 6, 2002, **AL-HUSSAYEN** signed the Student Certification of the INS Form I-20 at section eleven, which stated in pertinent part:

> I have read and agreed to comply with the terms and conditions of my admission. . . . I certify that all

> information provided on this form refers specifically to me and is true and correct to the best of my knowledge. I certify that I seek to enter or remain in the United States temporarily, and ***solely*** **for the purpose of pursuing a full course of study at [the University of Idaho].** I also authorize the named school to release any information from my records which is needed. [Emphasis added.]

AL-HUSSAYEN falsely made the certification, knowing of his internet and business activities alleged hereafter. On or about the same day of April 6, 2002, **AL-HUSSAYEN** formally submitted the INS Form I-20 dated April 6, 2002, to the United States Government at the United States Embassy in Riyadh, Kingdom of Saudi Arabia, and the United States Government issued **AL-HUSSAYEN** an F-1 student visa in direct reliance upon **AL-HUSSAYEN**'s certifications on the DOS Form DS-156 dated January 14, 2002, and attached DOS Form DS-157, together with the INS Form I-20 dated April 6, 2002. (See Counts Nine and Ten hereafter.)

14. On or about May 9, 2002, **AL-HUSSAYEN** was admitted by the United States Government into the United States at the John F. Kennedy International Airport in New York City, New York, as an F-1 student by virtue of the F-1 student visa issued April 6, 2002, and in direct reliance upon **AL-HUSSAYEN**'s certifications on the DOS Form DS-156 dated January 14, 2002, and attached DOS Form DS-157, together with the INS Form I-20 dated April 6, 2002. During the admission at the John F. Kennedy International Airport, **AL-HUSSAYEN** was inspected by INS and Customs officials. During the inspections, the INS Form I-20 dated April 6, 2002, was photocopied by the Customs officials, with the Customs

officials retaining the copy and the original being returned to **AL-HUSSAYEN**. (See Count Eleven hereafter.)

The Web-site Activities

15. From at least October 2, 1998, until the date of this Indictment, **AL-HUSSAYEN** engaged in computer web-site activities that exceeded his course of study at the University of Idaho. These activities included expert computer services, advice, assistance and support to organizations and individuals, including the IANA, in the form of web-site registration, management, administration and maintenance. A number of those web-sites accommodated materials that advocated violence against the United States.

16. The IANA was incorporated in 1993 in Colorado as a non-profit, charitable organization. It maintained offices in Ann Arbor, Michigan. Its official mission statement was that of *Da'wa*: the proselytizing and spreading the word of Islam. The IANA did this, in part, by providing a number of media outlets as vehicles for advocating Islam, such as internet web-sites with "bulletin boards," internet magazines, toll-free telephone lines, and audio ("radio.net") services. The IANA solicited and received donations of monies both from within the United States and without. The IANA also hosted regular Islamic conferences in the United States, with participation by individuals affiliated with other charitable organizations also located within the United States.

17. **AL-HUSSAYEN** was the formal registered agent for the IANA in Idaho (since May 11, 2001) and a business associate of the IANA in its purpose of *Da'wa*

(proselytizing), which included the web-site dissemination of radical Islamic ideology the purpose of which was indoctrination, recruitment of members, and the instigation of acts of violence and terrorism.

18. **AL-HUSSAYEN** was either the registrant or the administrative contact for a number of internet web-sites which either belonged to or were linked to the IANA. A number of said IANA-related web-sites were registered to **AL-HUSSAYEN** directly, to the IANA or to Dar Al-Asr, a Saudi Arabian company that provided web hostings on the internet. **AL-HUSSAYEN** registered web-sites on behalf of Dar Al-Asr, identifying himself as the administrative point of contact for Dar Al-Asr and giving his Moscow, Idaho street address and University of' Idaho e-mail address for reference.

19. Of the afore-referenced web-sites, **AL-HUSSAYEN** was the sole registrant of web-sites **www.alasr.ws** (created September 11, 2000), **www.cybermsa.org** (created March 15, 2001) and **www.liveislam.net** (created July 8, 2002). Web-sites **www.alasr.net** (created August 15, 1999), **www.almawred.com** (created November 1, 1999) and **www.heejrah.com** (February 22, 2000) were registered to Dar Al-Asr, with **AL-HUSSAYEN** as the administrative contact person. Web-site **www.almanar.net** (created October 2, 1998) was registered to Al-Manar Al-Jadeed Magazine, with **AL-HUSSAYEN** as the administrative contact person. **Iananet.org** (created August 11, 1995) was registered to IANA and designed and maintained by the web-site entity Dar Al-Asr. **Ianaradionet.com** (created May 25, 1999) was registered to IANA, with **AL-HUSSAYEN** as the head of its supervisory committee and member of its technical committee. **Islamway.com** (created August 18, 1998) was regis-

tered to IANA, with direct links to AL-HUSSAYEN's web-sites, including www.alasr.ws and www.cybersma.org. The registration of web-sites www.alhawali.org and www.alhawali.com (both created November 18, 2000) referenced Al-Asr and AL-HUSSAYEN, with AL-HUSSAYEN as the administrative contact for www.alhawali.com. These two web-sites corresponded to a radical sheikh referenced in paragraph 21 hereafter. Web-site www.islamtoday.net (created March 17, 2000) was related to a radical sheikh also referenced in paragraph 21 hereafter and posted articles to some of the Dar Al-Asr and AL-HUSSAYEN web-sites.

20. One of the afore-referenced web-sites registered by AL-HUSSAYEN was www.alasr.ws. On September 11, 2000, AL-HUSSAYEN registered the www.alasr.ws website. In about June of 2001, an article entitled "Provision of Suicide Operations" was published on the internet magazine of the website www.alasr.ws. The article was written by a radical Saudi sheikh. A portion of the article read as follows:

> The second part is the rule that the *Mujahid* (warrior) must kill himself if he knows that this will lead to killing a great number of the enemies, and that he will not be able to kill them without killing himself first or demolishing a center vital to the enemy or its military force, and so on. This is not possible except by involving the human element in the operation. In this new era, this can be accomplished with the modern means of bombing or bringing down an airplane on an important location that will cause the enemy great losses. [Emphasis added.]

21. Www.alasr.ws and other web-sites registered or linked to, or technically advised by AL-HUSSAYEN, in-

cluding www.islamway.com (previously mentioned), also posted other violent *jihad* (holy war)-related messages by other radical sheikhs, including those referenced in preceding paragraph 19.

Financial and Business Activities

22. From on or about August 17, 1994, until the date of this Indictment, **AL-HUSSAYEN**, at various times, maintained at least six United States bank accounts in Indiana, Texas, Idaho and Michigan. From at least January 23, 1997, until the date of this Indictment, **AL-HUSSAYEN** used said bank accounts to receive large sums of monies from within and without the United States, and to transfer and cause to be transferred large sums of monies to the IANA and other organizations and individuals.

23. From at least January 23, 1997, until the date of this Indictment, **AL-HUSSAYEN** received into and disbursed out of his bank accounts approximately $300,000.00 in excess of the university study-related funds he received during the same period of time, such as the monthly stipend he was given by the Saudi Arabian Government, and the living expenses that corresponded thereto. These excess funds included $49,992.00 paid to AL-HUSSAYEN on September 10, 1998, and $49,985.00 paid to him on September 25, 1998.

24. From at least November 16, 1999, to the date of this Indictment, **AL-HUSSAYEN** made disbursements of the excess funds referenced in the preceding paragraph to the IANA and to the IANA's officers, including a leading official of the IANA. A portion of these funds was used to pay operating expenses of the IANA, including salaries of IANA employees. Furthermore, in 1999,

2000 and 2001 wire transfers were made from **AL-HUSSAYEN** to individuals in Cairo, Egypt; Montreal, Canada; Riyadh, Kingdom of Saudi Arabia; Amman, Jordan; and Islamabad, Pakistan. **AL-HUSSAYEN** also made disbursements to other organizations and individuals associated therewith during the time referenced in this paragraph.

25. From at least November 16, 1999, to the date of this Indictment, **AL-HUSSAYEN** maintained frequent business contact with the leading IANA official referenced above. Not only did **AL-HUSSAYEN** disburse money directly to the official in the form of wire transfers and personal checks, their relationship also included the maintenance of a checking account in a Michigan bank in **AL-HUSSAYEN**'s name alone, but with the official's home address and the official's apparently exclusive use of the account. Among the deposits into the account was a $4,000.00 wire transfer from **AL-HUSSAYEN**, 311 Sweet Avenue, Apt 6, Moscow, Idaho, to **AL-HUSSAYEN**, 219 Fielderest Street, Ann Arbor, Michigan. In addition, numerous telephone calls between **AL-HUSSAYEN** and the official were made during the time referenced in this paragraph.

26. From at least March of 1995 until about February of 2002, the IANA received into its bank accounts approximately three million dollars ($3,000,000.00), including the funds received from **AL-HUSSAYEN** as referenced above, and disbursed approximately the same amount. The deposits included a three hundred thousand dollar ($300,000.00) transfer from a Swiss bank account on or about May 14, 1998.

27. From about December of 1994 to about July of 2002, **AL-HUSSAYEN** traveled and otherwise funded

travel for other individuals, including travel related to the IANA, through **AL-HUSSAYEN**'s bank accounts and to locations in numerous states, as well as foreign countries.

28. From at least January 1, 1997, until on or about August 28, 2002, telephones corresponding to **AL-HUSSAYEN** had contact with telephones subscribed to individuals or entities innumerous states, as well as foreign countries. Subscribers corresponding to or associated with some of the numbers included the IANA and the source of the $49,992.00 and $49,985.00 transfers previously referenced paragraph 23.

THE VIOLATIONS

In material reliance upon the information contained in the INS I-20 forms and the DOS Forms DS- 156 and DS-157 as heretofore referenced, the United States Government issued **AL-HUSSAYEN** F-1 student visas and allowed him to enter and remain in the United States. However, **AL-HUSSAYEN** entered into and remained in the United States for purposes other than that of solely pursuing his studies, including, but not limited to, material support of the IANA and others by means of his web-site and business activities, and knowingly and wilfully made false statements and omissions to the authorities of the United States in relation thereto. By not truthfully stating and revealing the nature and extent of his activities and affiliations in the United States, **AL-HUSSAYEN** thereby deprived the authorities of the United States of the knowledge thereof and the opportunity to evaluate and address the same within the context of the laws of the United States, resulting in

felony violations by the Defendant, **SAMI OMAR AL-HUSSAYEN**, consisting of Counts One through Eleven.

COUNT ONE
FALSE STATEMENT TO THE UNITED STATES
(Violation 18 U.S.C. 1001(a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about July 17, 1999, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraphs 5 and 6.)

COUNT TWO
VISA FRAUD
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about July 17, 1999, until the date of this Indictment, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraphs 5 and 6.)

COUNT THREE
VISA FRAUD
(Violation 18 U.S.C. 1546(a) and 3237)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about August 11, 1999, within and as the Same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States, (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, and (3) knowingly used a non-immigrant visa obtained by a false statement and claim, in that **SAMI OMAR AL-HUSSAYEN**, in entering into the United States, presented to United States Government authorities a student visa procured by means of a false statement and claim and other document containing such false statement and claim; in violation of Title 18, United States Code, Sections 1546(a) and 3237. (See previous paragraphs 5 through 7.)

COUNT FOUR
FALSE STATEMENT TO THE UNITED STATES
(Violation 18 U.S.C. 1001 (a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about July 7, 2000, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho; when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraph 8.)

COUNT FIVE
VISA FRAUD
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in fulJ herein.

On or about July 7, 2000 within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a

false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraph 8.)

COUNT SIX
VISA FRAUD
(Violation 18 U.S.C. 1546(a) and 3237)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about August 25, 2000, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigra-

tion laws and regulations of the United States, (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, and (3) knowingly used a non-immigrant visa obtained by a false statement and claim, in that **SAMI OMAR AL-HUSSAYEN**, in entering into the United States, presented to United States Government authorities a student visa procured by means of a false statement and claim and other document containing such false statement and claim; in violation of Title 18, United States Code, Sections 1546(a) and 3237. (See previous paragraphs 8 and 9.)

COUNT SEVEN
FALSE STATEMENT TO THE UNITED STATES
(Violation 18 U.S.C. 1001(a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about January 14, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted Department of State (DOS) form DS-156 and form DS-157, thereby knowingly and wilfully failing and refusing to inform United

States Government authorities of his involvement with the Islamic Assembly of North America and other entities; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraphs 10 through 12.)

COUNT EIGHT
VISA FRAUD
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about January 14, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted Department of State (DOS) form DS-156 and form DS-157, thereby knowingly and wilfully failing and refusing to inform United States Government authorities of his involvement with the Islamic Assembly of North America and other entities; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraphs 10 through 12.)

COUNT NINE
FALSE STATEMENT TO THE UNITED STATES
(Violation 18 U.S.C. 1001(a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about April 6, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraphs 10 through 13.)

COUNT TEN
VISA FRAUD
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about April 6, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including. but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraphs 10 through 13.)

COUNT ELEVEN
VISA FRAUD
(Violation 18 U.S.C. 1546(a) and 3237)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about May 9, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States, (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, and (3) knowingly used a non-immigrant visa obtained by a false statement and claim, in that **SAMI OMAR AL-HUSSAYEN**, in entering into the United States, presented to United States Government authorities a student visa procured by means of a false statement and claim and other document containing such false statement and claim; in violation of Title 18, United States Code, Sections 1546(a) and 3237. (See previous paragraphs 10 through 14.)

Dated this 13th day of February, 2003.

A TRUE BILL

/s/ ILLEGIBLE
FOREPERSON

THOMAS E. MOSS
UNITED STATES ATTORNEY

/s/ KIM R. LINDQUIST
KIM R. LINDQUIST
Assistant United States Attorney

/s/ TERRY L. DERDEN
TERRY L. DERDEN
First Assistant United States Attorney
Chief, Criminal Section

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. CV:05-093-S-EJL

ABDULLAH AL-KIDD, PLAINTIFF

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES; ET AL., DEFENDANTS

Filed: Sept. 27, 2006

MEMORANDUM ORDER

Pending before the Court in the above entitled matter are a motion to dismiss filed by the individually named Defendants and Plaintiff's motion to substitute. The parties have filed their responsive briefing and the matters are now ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7.1.

Factual and Procedural Background

On March 16, 2003 Mr. al-Kidd was handcuffed and arrested pursuant to a material witness warrant at the ticket counter of the Dulles International Airport while he was checking in for his flight to Saudi Arabia. He was taken to various different detention centers and eventually transported back to Idaho where, on March 31, 2003, he was released pursuant to certain terms and conditions which precluded him from leaving a four-state area of the United States. Mr. al-Kidd remained subject to these restrictions until June of 2004 when the trial of *United States v. Sami Omar Al-Hussayen* was completed, the trial in which Mr. al-Kidd was named as a material witness. The claims raised in the complaint here relate to the circumstances surrounding Mr. al-Kidd's arrest, detention, and treatment. The complaint alleges violations of the material witness statute and bail reform act, violations of the Fourth and Fifth Amendments, § 1983 claims, and claims under the Federal Tort Claims Act. The Defendants relevant to this motion are the individually named Defendants (collectively referred to as "the individual Defendants"): Federal Bureau of Investigation Special Agents Scott Mace and James Gneckow, former Attorney General of the United States John Ashcroft, and former Warden of the Oklahoma Federal Transfer Center Dennis M. Callahan. Mr. al-Kidd seeks civil damages from these individuals under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Standard of Review

I. Rule 12(b)(2)—Lack of Personal Jurisdiction:

Motions to dismiss for lack of personal jurisdiction are raised pursuant to Federal Rule of Civil Procedure 12(b)(2). Because this motion is resolved without a hearing, the plaintiff need only make out a *prima facie* case to withstand a motion to dismiss for lack of personal jurisdiction. *See Data Disc, Inc. v. System Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977). This requires that the plaintiff demonstrate facts that, if taken as true, would support exercising jurisdiction over the Defendants. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). "Although the plaintiff cannot 'simply rest on the bare allegations of its complaint,' uncontroverted allegations in the complaint must be taken as true." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citations omitted). Factual conflicts between the parties contained in their affidavits are resolved in the plaintiff's favor. *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

II. Rule 12(b)(6)—Failure to State a Claim:

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, the court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-

55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "'The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims.'" *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995). A claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the wrong legal theory or asks for improper relief. *See United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963).

Discussion

I. Claims as to Defendant Ashcroft:

The Defendant argues the claims against Mr. Ashcroft should be dismissed because this Court is without personal jurisdiction over him and he is entitled to absolute and qualified immunity on all claims against him.

A. Personal Jurisdiction:

Mr. al-Kidd argues that personal jurisdiction exists over Mr. Ashcroft because following the September 11, 2001 terrorist attacks he created a national policy to improperly seek material witness warrants, oversaw the

execution of such warrants, and failed to correct the constitutional violations of conducting such actions. In sum, Mr. al-Kidd contends that Mr. Ashcroft's actions in adopting a policy which results in the depravation of his constitutional rights is sufficient to overcome the motion to dismiss or, at least, allow for further discovery into the claims against Mr. Ashcroft. Mr. Ashcroft asserts these actions cannot form the basis for personal jurisdiction and that there are no facts alleged that Mr. Ashcroft had any personal involvement in the decision to arrest or detain Mr. al-Kidd.

Personal jurisdiction is required before a court may decide a case in controversy. U.S. CONST. amend. XIV. Where a defendant makes a motion to dismiss for lack of personal jurisdiction, the plaintiff has the burden to demonstrate that jurisdiction is appropriate. *Schwarzenegger*, 374 F.3d at 800. In a Rule 12(b)(2) motion, the Court may consider affidavits and other documents not mentioned in the complaint to make the personal jurisdiction determination. *National Union Fire Ins. Co. v. Aerohawk Aviation, Inc.*, 259 F. Supp. 2d 1096, 1101 (D. Idaho 2003). Where a motion is based only on written materials, "the plaintiff need only make a prima facie showing of jurisdictional facts." *Schwarzenegger*, 374 F.3d at 800. During review, uncontroverted allegations in the complaint must be taken as true and conflicts between the parties must be resolved in favor of the plaintiff. *Id.*

Because there is no applicable federal statute governing personal jurisdiction, this Court applies the law of the state in which it sits, in this case Idaho. *Id.* To properly exercise personal jurisdiction over Mr. Ashcroft pursuant to Idaho's long-arm statute, Mr. Ashcroft

must meet the requirements of the long-arm statute and the exercise of personal jurisdiction must comply with due process. *See State of Idaho v. M.A. Hanna Co.*, 819 F. Supp. 1464 (D. Idaho 1993). The Ninth Circuit has recognized that when the Idaho Legislature adopted the long-arm statute it intended to exercise all of the jurisdiction available under the Due Process Clause of the United States Constitution. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987), *see also Houghland Farms, Inc. v. Johnson*, 803 F.2d 978, 981 (Idaho 1990). Thus, the state and federal limits are co-extensive and an independent review of whether jurisdiction exists under the long-arm clause is unnecessary. *See Data Disc*, 557 F.2d at 1286.

There are two forms of personal jurisdiction: general and specific. *Lake*, 817 F.2d at 1420. If the defendant has "continuous and systematic" or "substantial" activities within the forum state, that state has general jurisdiction over the defendant. *Id.* Specific jurisdiction over the defendant is based on the quality and nature of the defendant's contacts with the forum state. *Id.* at 1421. Neither party alleges that this Court has general jurisdiction over Mr. Ashcroft, so the Court will determine whether it has specific personal jurisdiction over him.

To show that the defendant has sufficient contacts with the forum state to meet the specific personal jurisdiction requirements, the plaintiff must show that (1) the defendant purposefully availed himself of the privileges of the forum state, which invoked the benefits and protections of its laws; (2) the claims arose out of the defendant's forum-state related activities; and (3) the exercise

of jurisdiction would be reasonable. *Ziegler v. Indian River Co.*, 64 F.3d 470, 473 (9th Cir. 1995).

There is no respondeat superior liability in either a § 1983 or a *Bivens* action; thus, to hold a supervisory official liable the plaintiff must show one or more of the following are met:

> (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.

Elmaghraby v. Ashcroft, et. al, No. 04-CV-1409-JG-SMG, 2005 WL 2375202 *14 (E.D.N.Y.) (quoting *Richardson v. Goord*, 347 F.3d 431, 435 (2nd Cir. 2003)). Because "[p]ersonal jurisdiction cannot be based solely on a defendant's supervisory position," it must instead be shown that "defendant 'personally took part in the activities giving rise to the action at issue.'" *Outel Prods. Inc. v. Project Strategies Corp.*, 899 F.Supp. 1144, 1148 (S.D.N.Y. 1995). Where the complaint fails to sufficiently allege a defendant's involvement in any of the alleged violations of plaintiff's rights, a motion to dismiss should be granted. Where, however, such involvement is alleged but discovery is necessary to ascertain the extent of that involvement, the jurisdiction question overlaps with the merits of the claims and the motion to dismiss should be denied so as to allow discovery to go forward to resolve the question. *See Crawford-El v. Britton*, 523 U.S. 574 (1989); *see also Data Disc*, 557

F.2d at 1285 (stating where "the jurisdictional facts are enmeshed with the merits, . . . [the Plaintiff need only] establish a prima facie showing of jurisdictional facts with affidavits and perhaps discovery materials"). What is required on a motion to dismiss is that the complaint provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests" as required by Federal Rule of Civil Procedure 8(a). *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citation omitted).

The complaint here is replete with general allegations regarding the Department of Justice policies following September 11, 2001 including that the Department of Justice adopted a new policy and practice after September 11, 2001 which used the material witness statute as "a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or investigate for possible criminal wrongdoing. . . . " (Dkt. No. 40). The complaint goes on to allege that as a result of this new practice individuals were held for "unreasonably prolonged" periods of time as material witnesses and routinely detained in high-security detention conditions as "terrorism suspects, rather than true witnesses." (Dkt. No. 40). These generalized and conclusory allegations alone are insufficient to invoke personal jurisdiction over any of the named Defendants in this action. They do, however, lend weight to the complaint's allegations that Mr. Ashcroft knew or should have known of the alleged violations given the level of publicity coverage over the allegations that the Department of Justice was using the material

witness statute in an unlawful and abusive manner. (Dkt. No. 40, ¶ 136-41).

The complaint asserts Mr. Ashcroft, as the head of the Department of Justice, was the "principal architect of, authorized and set into motion, these policies and practices regarding the material witness statute, and had responsibility for their implementation and administration" and that Mr. Ashcroft knew or should have known of the "unlawful, excessive, and punitive manner in which the federal material witness statute was being used" and should have foreseen the resulting constitutional violations and failed to act to correct such violations. (Dkt. No. 40, ¶ 136-141).

These allegations against Mr. Ashcroft are sufficient to withstand the motion to dismiss based on a lack of personal jurisdiction. While a superior cannot be held liable simply by virtue of his position, where a plaintiff alleges sufficient facts to state a claim that the defendant was personally involved in the alleged violations and/or knew or should have known of the violations and failed to correct the conduct the superior may be liable. *See Hydrick v. Hunter*, 449 F.3d 978, 991 (9th Cir. 2006) (recognizing "a supervisor is liable for the constitutional violations of subordinates 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.'") (citation omitted). The allegations in the complaint in this case are based on more than Mr. Ashcroft's supervisory status, as the Defendant argues. Here the claims against Mr. Ashcroft contend that he spear-headed the post-September 11, 2001 practice of the Department of Justice to use the material witness statute to detain individuals whom they sought to investigate but had not charged with a crime.

Additionally, that Mr. Ashcroft either knew or should have known the violations were occurring and did not act to correct the violations. Further, the complaint alleges Mr. Ashcroft knew or should have known of the constitutional violations to witnesses held pursuant to the unlawful policy, including Mr. al-Kidd. As such, the complaint has alleged facts which, if true, would subject Mr. Ashcroft to jurisdiction in this District and have stated a claim upon which relief could be granted. These allegations are sufficient to withstand the motion to dismiss. *See Elmaghraby v. Ashcroft*, No. 04-CV-1409-JG-SMG, 2005 WL 2375202 *10 (E.D.N.Y. 2005).

B. Absolute Immunity:

Mr. Ashcroft argues that he enjoys absolute immunity against these claims arguing the prosecutorial immunity doctrine applies. Such immunity, he argues, exists here because the complaint's allegations fail to state a claim as they improperly focus on the Defendant's motives in seeking the warrant when the proper inquiry for the claims turns on the nature or function of the Defendant's activity, not the intent or motive. Prosecutors are absolutely immune from civil liability for their conduct insofar as it is "intimately associated" with the judicial phase of the criminal process. *Botello v. Gammick*, 413 F.3d 971, 975-76 (9th Cir. 2005) (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)) (citations omitted). The Ninth Circuit has recently detailed the immunity afforded to prosecutors in the context of § 1983 actions:

> A prosecutor is protected by absolute immunity from liability for damages under § 1983 "when performing the traditional functions of an advocate." *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997). However, "the ac-

> tions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Prosecutorial immunity depends on "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). Prosecutors are entitled to qualified immunity, rather than absolute immunity, when they perform administrative functions, or "investigative functions normally performed by a detective or police officer." *Id.* at 126; *see also Burns v. Reed*, 500 U.S. 478, 494-96 (1991).

Genzler v. Longanbach, 410 F.3d 630, 636 (9th Cir. 2005); *see also Wilson v. Layne*, 526 U.S. 603, 609 (1999) (recognizing that *Bivens* cases employ the same standard as that used in § 1983 cases). Mr. al-Kidd argues that the nature and function of Mr. Ashcroft's actions were not prosecutorial but investigative and, at best are only afforded qualified immunity. Mr. Ashcroft maintains that any involvement on his part was as a prosecutor.

Although the line between the functions is not entirely clear, it is clear that absolute prosecutorial immunity is justified "only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Botello*, 413 F.3d at 975-76 (quoting *Burns*, 500 U.S. at 494). "On the one hand, it is well established that a prosecutor has absolute immunity for the decision to prosecute a particular case, and for the decision not to prosecute a particular case or group of cases." *Id.* In addition, a prosecutor's professional evaluation of a witness is entitled to abso-

lute immunity "even if that judgment is harsh, unfair or clouded by personal animus." *Id.*; *see also Genzler*, 410 F.3d at 636-38 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("The Supreme Court rejected the idea that prosecutors are only entitled to qualified immunity when they are engaged in investigation" stating in *Buckley*, that "'evaluating evidence and interviewing witnesses' in preparation for trial is advocacy even though such pretrial activities may be 'investigatory' in nature.").

However, "prosecutors are not entitled to absolute immunity for advising police officers during the investigative phase of a criminal case, performing acts which are generally considered functions of the police, acting prior to having probable cause to arrest, or making statements to the public concerning criminal proceedings." *Botello*, 413 F.3d at 976-77 (citations omitted). "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274. "[A] determination of probable cause does not guarantee a prosecutor absolute immunity for liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5.

"The question is whether a prosecutor's investigation is of the type normally done by police, in which case prosecutors enjoy only qualified immunity, or whether an investigation is bound up with the judicial process, thus affording prosecutors the heightened protection of absolute immunity." *Genzler*, 410 F.3d at 636-38. To determine whether an action is judicial, administrative or investigative, the court looks at "the nature of the

function performed, not the identity of the actor who performed it." *Botello*, 413 F.3d at 975-76 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997)) (citation omitted). Thus, whether a prosecutor benefits from absolute or qualified immunity depends on which of the prosecutor's actions are challenged. *Id.* The official seeking absolute immunity bears the burden of demonstrating that absolute immunity is justified for the function in question. *Id.* (citing *Buckley, supra)*. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the course of their duties. *Id.* (citing *Burns, supra*).

The particular function which Mr. al-Kidd alleges was taken by Mr. Ashcroft resulting in the constitutional violations was the development and implementation of a new policy and practice for use of the material witness statute as an investigative tool to detain and/or investigate for possible criminal wrongdoing or to otherwise hold certain individuals preventively where the Government lacked probable cause. The allegations are that Mr. Ashcroft "directed and oversaw an investigative law enforcement policy and that he used the material witness statute to preventively detain and investigate suspects." (Dkt. No. 63, p. 30). As a result of this policy, Mr. al-Kidd alleges his constitutional rights were violated and Mr. Ashcroft knew, should have known, or acted with reckless disregard and deliberate indifference in failing to correct the policy. As this new policy applies to Mr. al-Kidd's case, he points to various Government reports and the testimony of Director Mueller's testimony before Congress.

The allegations here relate to Mr. Ashcroft's actions which fall within the investigation realm of the type nor-

mally done by police. The development and practice of using the material witness statute to detain individuals while investigating possible criminal activity qualifies as police type investigative activity, not prosecutorial advocacy. Accordingly, Mr. Ashcroft is not entitled to absolute immunity but may be entitled to qualified immunity, which is discussed below.

II. Qualified Immunity:

Government officials enjoy qualified immunity when performing discretionary functions such that they are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test for evaluating a qualified immunity claim is to first "determine whether the plaintiff has shown that the action complained of constituted a violation of his or her constitutional rights. If the court is satisfied that a constitutional violation occurred at the hands of a government official, the second step is to determine: (1) whether the violated right was clearly established and (2) whether a reasonable public official could have believed that the particular conduct at issue was lawful. As such, the process of determining qualified immunity is an examination of the 'objective legal reasonableness' of a government official's conduct." *Id.* at 818.

A. Defendants Mace and Gneckow:

The claims against Defendants Mace and Gneckow are primarily related to their involvement in obtaining the material witness warrant. Agent Mace prepared and

signed the affidavit supporting the warrant application and Agent Gneckow provided the information to Agent Mace upon which the application and affidavit were based.[1] The motion to dismiss asserts Defendants Mace

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[1] The three paragraphs of the affidavit (Dkt. No. 40, pp. 50-51) most applicable here state:

6) On February 13, 2003, an Indictment was filed . . . alleging . . . False Statement to the United States; and . Visa Fraud. During the course of that investigation, information was developed regarding the involvement of Abdullah Al-Kidd with [Sami Omar Al-Hussayen]. That information includes that from March 2000 to November 2001, an individual identified as [Mr. al-Kidd], and/or his spouse, Nadine Zegura, received payments from Sami Omar Al-Hussayen and his associates in excess of $20,000.00. Al-Kidd traveled to Sana'a, Yemen, in August 2001 and remained there until April 2002, when he returned to the United States. Upon his return to the United States, Al-Kidd traveled to Moscow, Idaho, and met with Al-Hussayen's associates. While in Moscow, Al-Kidd emptied a storage facility which contained personal items belonging to him. Among those personal items were documents Al-Kidd left behind, which included a conference program for the second annual IANA conference in Dearborn, Michigan, in December 1994; a hotel receipt from Sacramento, California, dated 4/26/2001, in the name of Abdullah Al-Kidd, listing his company name as "Al-Multaqa;" and telephone numbers for IANA (734-528-0006) and Basem Khafagi (734-481-1930). Khafagi is a former Director of IANA and former University of Idaho student (graduated in 1988) who was recently arrested in New York.

7) Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.

8) Due to Al-Kidd's demonstrated involvement with the defendant, Sami Omar Al-Hussayen, he is believed to be in possession of information germane to this matter which will be crucial to the prosecution. It is believed that if Al-Kidd travels to Saudi Arabia, the United

and Gneckow are entitled to qualified immunity because the arrest warrant was supported by probable cause, or at least "arguable" probable cause, as required by 18 U.S.C. § 3144. Mr. al-Kidd alleges the complaint properly states a claim against agents Mace and Gneckow because probable cause for the issuance of the warrant did not exist; raising arguments involving the *Franks* and *Malley* tests arguing the statements made in the affidavit were deliberately false and contained material omissions.

Mr. al-Kidd further asserts that the probable cause requirements for issuance of a material witness warrant are a different inquiry than that for an arrest warrant for a criminal suspect. In support of this argument, Mr. al-Kidd relies upon *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971). In that case, Bacon was arrested under a material witness arrest warrant in order to secure her testimony before a grand jury. Mr. al-Kidd relies on dicta in the opinion where the court, after finding the affidavit submitted in support of the arrest warrant failed to show that Bacon was likely to flee, distinguished the case from the situation where a witness was served with a subpoena. The service of a subpoena, the court noted, would have given Bacon an opportunity, as afforded to most witnesses, to voluntarily comply with the subpoena before being arrested and/or detained. The court concluded that the denial of that opportunity was not warranted on the facts in Bacon's case. *Id.* at 945. This language and reasoning does not, as Mr. al-Kidd contends, stand for the proposition that all potential witnesses must be given to an opportunity to appear

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States Government will be unable to secure his presence at trial via subpoena.

to testify prior to a material witness arrest warrant being sought and executed. What is required for the issuance of a material witness arrest warrant is that "the judicial officer must have probable cause to believe (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his [or her] presence by subpoena.'" *Id.* at 943 (quoting 18 U.S.C. § 3149). Here, the Government asserts that probable cause was shown on both prongs of the test and, therefore, the individual Defendants are entitled to qualified immunity.

As to the materiality question the Government states that the "warrant application presented evidence that plaintiff was involved in business activities that served as the basis for the underlying prosecution of Sami Omar Al-Hussayen" and "[o]n that basis, Judge Williams correctly concluded that there was probable cause to believe that plaintiff's testimony could be material." (Dkt. No. 71, p. 7 n.4). Further, the Government points out that "'a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy' the materiality criterion." *Bacon*, 449 F.2d 943 (distinguishing between the first prong and the second prong concluding that the second prong requires more than mere assertions). As to the second prong, the Government maintains that the impracticability requirement is analyzed consistent with the case law addressing whether an individual is a flight risk and that the Court should look at the totality of the circumstances in making the determination. (Dkt. No. 71, p. 9). Applying this standard, the Government argues Mr. al-Kidd was a flight risk as he was business associate and potential witness in the trial of Mr. Al-Hussayen which involved terrorism related charges; he was scheduled to travel to

Saudi Arabia where there is no extradition treaty with the United States after Mr. Al-Hussayen's indictment and arrest; it appeared that Mr. al-Kidd had the resources, connections, and skills necessary to remain abroad for an extensive period of time and avoid apprehension; he did not report his travel plans to law enforcement nor offer to return for trial or provide any contact information. (Dkt. No. 71, p. 12). The Government also contends Mr. al-Kidd should have consulted with law enforcement regarding his travel plans before leaving because he was aware of the investigation and indictment of Mr. Al-Hussayén and that he was a potential witness in the case. (Dkt. No. 71, p. 12 n. 10).

On the other hand, Mr. al-Kidd argues probable cause was not shown in the warrant affidavit as to either prong of the test. In addition, Mr. al-Kidd asserts that the affidavit contained false statements and omissions which were misleading to the magistrate judge's determination of whether to issue the warrant. In particular, he notes that the affidavit omitted the fact that he was a native-born United States citizen with family ties to the United States, had cooperated with the FBI previously, was not informed that he could not travel or that he needed to inform the FBI of his travel plans, and was not asked to testify or make himself available to testify prior to the Government seeking a warrant.[2] The affi-

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[2] Specifically, Mr. al-Kidd notes the following omissions and false statements:

1) failing to state Mr. al-Kidd and Mr. Al-Hussayen worked together for the same charitable Islamic organization and that Mr. Al-Hussayen was responsible for paying Mr. al-Kidd's salary; thus the $20,000 he received was his salary for work performed over a significant period of time. (Dkt. No. 40, ¶ 60).

davit also, he contends, falsely represented that he had a one-way first class ticket costing $5,000 to Saudi Arabia when he actually had a round-trip coach ticket costing $1,700.

The question before the Court on this motion is the limited question of whether or not the complaint states a cause of action upon which relief can be granted. To establish a prima facie case under 42 U.S.C. § 1983, Plaintiffs "must adduce proof of two elements: (1) the action occurred 'under color of law' and (2) the action resulted in a deprivation of a constitutional right or a federal statutory right." *Souders v. Lucero*, 196 F.3d 1040, 1043 (9th Cir. 1999) (citation omitted); *see also Wilson*, 526 U.S. at 609 (recognizing that *Bivens* cases

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2) failing to state that Mr al-Kidd was a native-born United States citizen with substantial ties to the United States, including his native-born United States citizen mother, father, sibling, wife, and child. (Dkt. No. 40, ¶¶ 15, 39, 40).

3) failing to state that Mr. al-Kidd had previously cooperated and talked with the FBI, voluntarily answering questions and appearing at all pre-arranged meetings. (Dkt. No. 40, ¶¶ 15, 54).

4) failing to state that the FBI had not contacted Mr. al-Kidd for six months at the time of the application and the FBI had not told him he might be needed as a witness, could not travel abroad, or that he needed to inform the FBI of such travel. (Dkt. No. 40, ¶¶ 15, 54).

5) failing to state that the FBI had not sought Mr. al-Kidd's voluntary cooperation, agreement to testify, or willingness to remain in the United States to be available to testify prior to seeking the warrant.

6) falsely stating the facts related to his air travel as being a one-way, first-class ticket costing approximately $5,000 when the ticket was a round-trip coach ticket costing approximately $1,700. (Dkt. No. 40, ¶¶ 14, 53).

employ the same standard as that used in § 1983 cases). "In order to state a claim under § 1983 for statements in an affidavit to procure a warrant, a plaintiff must show that the investigator made deliberately false statements or recklessly disregarded the truth in the affidavit and that the fabrications were material to the finding of probable cause." *Gailbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citations and quotations omitted). The threshold inquiry is "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws." *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

Taking the allegations as true, as the Court must on this motion, the Court concludes that the complaint adequately states causes of action upon which relief can be granted. The parties both raise arguments as to the question of whether probable cause existed for the issuance of the material witness arrest warrant in this case.[3] Generally, police officers are entitled to qualified immunity if a reasonable officer in his or her position would have an arguable basis to believe probable cause existed to arrest or to seek an arrest warrant "in light of clearly established law and the information the [arresting] officers possessed.'" *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1294 (9th Cir. 1999) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citation omitted).

Mr. al-Kidd's allegations are that probable cause was not shown in the warrant application and, therefore, his

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[3] The Government states in its reply that Mr. al-Kidd has not challenged the materiality requirement of 18 U.S.C. § 3144 (Dkt. No. 71, p. 7), however, in his response brief Mr. al-Kidd does contend that probable cause did not exist as to the materiality question. (Dkt. No. 63, p. 17).

constitutional rights were violated. Mr. al-Kidd asserts that in seeking the warrant the officers made material omissions and misstatements upon which the magistrate judge relied in determining probable cause existed and granting the request for a warrant. The Defendants have challenged these allegations and have asserted their own affirmative defenses to the claims. The Defendants' arguments dispute the factual allegations in the complaint and ask the Court to weigh the facts going to the probable cause determination contrary to the facts alleged in the complaint. This is not the appropriate inquiry on this motion. The question of whether qualified immunity applies to the officers in this case can not be resolved on a motion to dismiss for failure to state claim in light of requirement to assume the truth of facts as plead. *Morley v. Walker*, 175 F.3d 756, 760 (9th Cir. 1999). While true that "arguable probable cause" could entitle the officers to the qualified immunity defense, *Hunter*, 502 U.S. at 227, Mr. al-Kidd's factual allegations here regarding the officers' misrepresentations and omissions in the warrant application, if true, would negate the possibility of qualified immunity regardless of the probable cause finding and, therefore, the complaint survives the motion to dismiss. *See Morley*, 175 F.3d at 761; *see also Mendocino Environmental Center*, 192 F.3d at 1294 n.18 ("The issue is not whether the contents of the affidavits, if true, were adequate to provide probable cause. Rather, here, the [plaintiff's] contention is that the [defendants] obtained the warrants by misrepresenting the facts in the affidavits."). The Court also notes that many of the cases cited by the Defendants to support their arguments involved motions for summary judgment which apply a different standard. Because the facts alleged in the complaint state causes

of action upon which relief can be granted, the Court will deny the motion to dismiss.

B. Defendant Ashcroft:

Mr. Ashcroft also asserts that qualified immunity precludes any liability against him because there are no factual allegations that he was personally involved in any decisions relating to Mr. al-Kidd's arrest, detention, and conditions of confinement or even aware of such conditions or detention. Defendant argues the vague and conclusory allegations in the complaint allege nothing more than a claim against Mr. Ashcroft based upon his supervisory status but not upon his actual personal involvement. The Court finds the allegations in the complaint, if true, are sufficient on this motion to raise a claim for relief against Mr. Ashcroft as to his involvement in the constitutional violations allegedly incurred by Mr. al-Kidd. As decided above in the personal jurisdiction section, the allegations against Mr. Ashcroft involve more than vicarious liability but assert claims involving Mr. Ashcroft's own knowledge and actions related to Mr. al-Kidd's alleged constitutional deprivations. Whether these allegations can be substantiated is a question to be decided later.

III. Claims as to Defendant Callahan:

Mr. Callahan argues dismissal of all claims against him is warranted as he did not become the warden of the Oklahoma Federal Transfer Center until after Mr. al-Kidd was released. In response, Mr. al-Kidd has conceded that Mr. Callahan should be dismissed and filed a motion to substitute John Sugrue, the Warden of the Oklahoma Federal Transfer Center at the time of Mr.

al-Kidd's detention. (Dkt. No. 58). Accordingly the Court will dismiss Mr. Callahan as a party in this action.

As to the motion to substitute Mr. Sugrue in this case, the Defendants have filed an opposition to the motion arguing the motion is untimely, fails to meet the precepts of Rule 15(c), and because the Court lacks personal jurisdiction over Mr. Sugrue and the claims are without merit. Mr. al-Kidd disagrees and maintains the substitution should be allowed and his claims should relate back to the time of the filing of the complaint pursuant to Federal Rule of Civil Procedure 15(c)(3).

The Government argues the requirements for service and notice of Rule 15(c)(3) are not met here because they do not allow for notice by way of service upon the United States in the case of claims raised against a person in their individual capacity. Mr. al-Kidd maintains that Rule 15(c)(3) allows for relation-back of claims against government defendants sued individually. Rule 15(c) states:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is sat-

> isfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Four factors generally guide a court's determination regarding whether to allow an amendment to a pleading: undue delay, bad faith, prejudice to the opposing party, and futility of amendment. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1482 (9th Cir. 1997). Amendments to the complaint are allowed in cases where "the previously unknown defendants were identified only after the statute of limitations had run." *Blackhawk v. City of Chubbuck*, No. 04-CV-629-E-BLW, 2005 WL 3244406 *1 (D. Idaho Nov. 21, 2005) (citations omitted).

Here, Mr. Callahan was named in his individual capacity as warden of the Oklahoma Federal Transfer Center at the time Mr. al-Kidd was held there. Upon

discovering that Mr. Sugrue was actually the warden at the time applicable here, Mr. al-Kidd has sought to amend the complaint to name the appropriate individual. This was clearly a mistake on the part of Mr. al-Kidd caused by the fact that he was wrongly informed at the time of the filing of the initial complaint. Further, it appears the Defendants "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed. R. Civ. P. 15(c)(3)(B); *see also Blackhawk v. City of Chubbuck*, No. 04-CV-629-E-BLW, 2005 WL 3244406 *1 (D. Idaho Nov. 21, 2005) ("In the Ninth Circuit, the mistake requirement is construed more liberally than in other circuits."). Therefore, the question on this motion turns on whether the notice requirements of Rule 15(c)(3) are met.

Here, Mr. al-Kidd argues the notice was timely made by service of the complaint upon the United States, that the requested amendment will not prejudice the defense, and that the Government knew or should have known that but for the mistake the action would have been brought against the proper party. The Government disputes that the notice requirements were met. "The Ninth Circuit recognizes the 'imputed notice'/ 'community of interest' theory which, for the purpose of applying relation back, allows courts to infer notice when the party actually notified and the party assumedly notified 'are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other.'" *Blackhawk v. City of Chubbuck*, No. 04-CV-629-E-BLW, 2005 WL 3244406 *1 (D. Idaho Nov. 21, 2005) (*citing G.F. Co. v. Pan Ocean Shipping*, 23 F.3d 1498, 1503 (9th Cir. 1994) (quoting 6A Charles Miller, et al.,

Federal Practice and Procedure § 1499 at 146 (2d ed. 1990)). The Court finds the notice requirement here is satisfied. "Informal notice is sufficient if it allows the defendant the opportunity to prepare a defense." *Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 157 (N.D.Cal. Jun. 23, 2005) (citing *Craig v. United States*, 479 F.2d 35, 36 (9th Cir. 1973)). The Government was properly served with the initial complaint in this matter, the claims against Mr. Sugrue remain the same as those raised against Mr. Callahan, the attorney's representing Mr. Sugrue remain the same, and the Government's response to the motion itself demonstrates that Mr. Sugrue will not be prejudiced and is able to present a defense to the charges. Accordingly, the Court will grant the motion to substitute Mr. Sugrue for Mr. Callahan. The amendments shall relate back to the date of the filing of the original complaint.

The Government also alleges that the proposed amendment should be denied as it is frivolous because the Court lacks jurisdiction over Mr. Sugrue and/or because *Bivens* actions do not allow for vicarious liability. Mr. al-Kidd opposes both claims. Though the Court recognizes that "[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend," the question of whether or not Mr. Sugrue is subject to personal jurisdiction and/or whether the complaint states a cause of action upon which relief can be granted are issues not yet fully briefed by the parties. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). In response to the Government's motion to dismiss, Mr. al-Kidd conceded the error in naming Mr. Callahan and filed the instant request to substitute parties. Accordingly neither party completed the briefing on these questions on the motion to dismiss or as the arguments apply to this Defendant.

Therefore, the Court will allow Mr. Sugrue leave to file a motion to dismiss on or before October 30, 2006. The parties shall file their responsive briefing accordingly and the Court will render its decision in due course.

ORDER

Based on the foregoing and being fully advised in the premises, the Court HEREBY ORDERS as follows:

1) The Motion to Substitute Party (Dkt. No. 58) is **GRANTED**. The Clerk of the Court is directed to **DISMISS** Defendant Dennis Callahan from the action and **SUBSTITUTE** Defendant John Sugrue, Former Warden, Oklahoma Federal Transfer Center, in the place of Defendant Dennis Callahan.

2) The Motions to Dismiss (Dkt. Nos. 47, 55) are **DENIED**.

3) The Government is granted leave to file a motion to dismiss as to Defendant Sugrue on or before October 30, 2006.

DATED: **Sept. 27, 2006**

[SEAL OMITTED]

/s/ EDWARD J. LODGE
EDWARD J. LODGE
U.S. District Judge

PETITIONER'S BRIEF

6

No. 10-98

Supreme Court, U.S.
FILED
DEC 13 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Respondent was arrested on a material-witness warrant issued by a federal magistrate judge under 18 U.S.C. 3144 in connection with a pending prosecution. He later filed a *Bivens* action against petitioner, the former Attorney General of the United States, seeking damages for his arrest. Respondent alleged that his arrest resulted from a policy implemented by the former Attorney General of using the material-witness statute as a "pretext" to investigate and preventively detain terrorism suspects. In addition, respondent alleged that the affidavit submitted in support of the warrant for his arrest contained false statements. The questions presented are:

1. Whether the court of appeals erred in denying petitioner absolute immunity from the pretext claim.

2. Whether the court of appeals erred in denying petitioner qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material-witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of respondent's arrest.

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In the Supreme Court of the United States

No. 10-98

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-105a) is reported at 580 F.3d 949. Opinions concurring in and dissenting from the denial of rehearing en banc (Pet. App. 106a-132a) are reported at 598 F.3d 1129. The opinion of the district court (J.A. 90-116) is not published in the Federal Supplement but is available at 2006 WL 5429570.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2009. A petition for rehearing was denied on March 18, 2010 (Pet. App. 106a). On June 7, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 16, 2010, and the petition was filed on that date. The

petition was granted on October 18, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The material-witness statute, 18 U.S.C. 3144, provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

STATEMENT

1. In the wake of the terrorist attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) conducted anti-terrorism investigations across the globe, including in Idaho. In February 2003, a grand jury sitting in the District of Idaho returned an indictment charging Sami Omar Al-Hussayen, a citizen of Saudi Arabia, with multiple false-statement and visa-fraud offenses.[1] The charges against Al-Hussayen centered on allegations that he had falsely stated in his applications for a student visa that he was entering the United States solely for the purpose of pursuing a course of academic study, when in fact he was spending much of his time providing technical support to the Islamic Assembly of North America (IANA), an organization that disseminated radical Islamic ideology and sought to recruit others to engage in acts of violence and terrorism. J.A. 68-76. The indictment also alleged that Al-Hussayen moved significant sums through his bank account—approximately $300,000 in excess of his student fees—that were used "to pay operating expenses of the IANA, including salaries of IANA employees." J.A. 76.

During its investigation, the FBI learned that respondent had a number of ties to Al-Hussayen. One month after Al-Hussayen was indicted, the FBI also learned that respondent had booked an airplane ticket to Saudi Arabia. At that point, the United States Attorney's Office for the District of Idaho, which was prosecuting Al-Hussayen, applied to the magistrate judge for a warrant for respondent's arrest under the material-witness statute, 18 U.S.C. 3144. J.A. 59-60. In the war-

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[1] Later, superseding indictments added three counts of conspiracy to provide material support to terrorist organizations.

rant application, prosecutors averred that respondent's testimony was "material to both the prosecution and the defendant" in the Al-Hussayen case and that there was a risk that respondent would be unavailable "unless the Court detains or imposes restrictions on the travel of said material witness." J.A. 60.

The application was supported by an affidavit of FBI Special Agent Scott Mace. J.A. 61-65. In the affidavit, Mace stated that respondent had received "payments from [Al-Hussayen] and his associates in excess of $20,000.00" and had met with Al-Hussayen's associates and IANA officials shortly after returning from a trip to Yemen. J.A. 63. Based on that information, Mace stated that respondent "is believed to be in possession of information germane to this matter which will be crucial to the prosecution." J.A. 64. Mace further stated that respondent "is scheduled to take a one-way, first class flight (costing approximately $5,000) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST." *Ibid.* The affidavit concluded by stating that "if [respondent] travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." *Ibid.*

On March 14, 2003, the magistrate judge granted the government's application, issued an arrest warrant, and ordered that respondent be brought before the court "for the purpose of setting the methods and conditions of release." Order, 3:03-cr-00048-EJL Docket entry No. 35 (D. Idaho Mar. 17, 2003). Two days later, on March 16, FBI agents arrested respondent at Dulles International Airport as he prepared to board his flight to Saudi Arabia. J.A. 29. The next day, respondent appeared before a magistrate judge in the Eastern District of Virginia and agreed to be transferred to Idaho. J.A. 32. He

was then detained briefly at the Alexandria Detention Center in Virginia before being sent to the Ada County Jail in Boise, Idaho, via a federal transfer facility in Oklahoma. J.A. 30.

b. Nine days later, on March 25, respondent appeared with counsel before the Idaho magistrate judge who had issued the arrest warrant. J.A. 35-36. At a second hearing on March 31, the government proposed that respondent be released from custody subject to certain conditions. J.A. 38. The court agreed, releasing respondent that day to the custody of his wife on condition that he continue to reside with her in Nevada, surrender his passport, and limit his travel to Nevada and three other states. *Ibid.* In total, respondent spent 15 days in detention. J.A. 13.

Al-Hussayen's trial ended in June 2004, when the jury acquitted him on some charges and failed to reach a verdict on others. Respondent did not testify at the trial. J.A. 14. After the trial concluded, the district court granted respondent's motion to terminate the conditions of his release. J.A. 39.

2. In March 2005, respondent sued the United States and several government officials, including petitioner, the former Attorney General of the United States. The complaint sought damages for alleged violations of, *inter alia*, the material-witness statute and the Fourth Amendment. J.A. 51-52.[2]

Respondent's complaint rested on two factual assertions. First, respondent claimed that, in response to the September 11, 2001, terrorist attacks, petitioner imple-

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[2] Respondent also sought damages based on the conditions of his confinement during the 15 days he was in custody. J.A. 52-54. The court of appeals ordered that claim dismissed, Pet. App. 59a, and it is not at issue here.

mented a policy of using the material-witness statute as a pretextual tool to investigate and detain terrorism suspects whom the government lacked probable cause to charge criminally. Respondent said that he was arrested as a result of this alleged policy, which he contended violated the Fourth Amendment. J.A. 39-50. Second, respondent alleged that the affidavit submitted in support of the material-witness warrant contained deliberately false statements. Respondent did not take issue with the statements in the affidavit that he knew Al-Hussayen, that he had met with Al-Hussayen and IANA officials, that he received payments from Al-Hussayen and his associates exceeding $20,000, or that he had been about to leave for Saudi Arabia. But he alleged that, contrary to the affidavit, his airplane ticket to Saudi Arabia was not a one-way first-class ticket costing $5000, but instead a round-trip coach ticket costing $1700. J.A. 25. Respondent also claimed that the affidavit omitted material information, including that he was a United States citizen and that he had previously cooperated with the FBI investigation. *Ibid.*

Petitioner and the other individual defendants moved to dismiss on grounds of personal jurisdiction, official immunity, and inadequate pleading. The district court denied the motions, J.A. 90-116, and petitioner filed an interlocutory appeal.[3]

3. A divided panel of the court of appeals affirmed in relevant part. Pet. App. 1a-105a.

a. The court of appeals held that petitioner was not entitled to absolute immunity on respondent's claims that petitioner implemented a policy of using the

[3] The other defendants did not join petitioner's interlocutory appeal, and respondent has continued to litigate his claims against them in the district court.

material-witness statute as a pretext to detain terrorism suspects for investigative or preventive purposes. Pet. App. 14a-27a. The court acknowledged that prosecutors are entitled to absolute immunity "when they engage in activities 'intimately associated with the judicial phase of the criminal process,'" *id.* at 14a (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976)), and that "absolute immunity ordinarily attaches to the decision to seek a material witness warrant," *id.* at 18a. The court stated, however, that whether such immunity attaches in any particular case depends on "the prosecutor's *mission* and *purpose*." *Id.* at 23a. In particular, the court held that absolute immunity does not apply if the prosecutor's "immediate purpose" in seeking the material witness warrant is "to investigate or preemptively detain a suspect." *Id.* at 25a (emphasis omitted). Concluding that respondent had alleged sufficient facts "to render plausible the allegation of an investigatory function," the court held that absolute immunity did not apply. *Id.* at 26a.

The court of appeals next rejected petitioner's claim of qualified immunity. The court reasoned that, even if all the requirements of the material-witness statute are satisfied and a judge issues a valid arrest warrant, the Fourth Amendment prohibits a seizure based on that warrant when the prosecutor's immediate motivation is to conduct further investigation or preventively detain a suspect. Pet. App. 30a-40a. The court rejected the argument that *Whren* v. *United States*, 517 U.S. 806 (1996), forecloses an inquiry into subjective purpose or "pretext" in determining the validity of an arrest. In the court's view, "*Whren* rejected only the proposition that 'ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that

a violation of law has occurred.'" Pet. App. 32a (quoting *Whren*, 517 U.S. at 811). Because material-witness arrests are not based on suspected wrongdoing, the court reasoned, the relevant precedent was instead *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), in which this Court held that the Fourth Amendment prohibits motor-vehicle checkpoints designed to interdict drugs. Pet. App. 36a 38a. The court concluded that *Edmond* permits inquiry into "programmatic purpose" to assess "the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Id.* at 36a (quoting *Edmond*, 531 U.S. at 45-46). The court therefore held that respondent had stated a valid Fourth Amendment claim in alleging that his arrest resulted from petitioner's policy of using the material witness pretextually.

The court of appeals also held that the illegality of that policy was clearly established at the time of respondent's arrest. Pet. App. 40a-47a. The court acknowledged that "[i]n March 2003, no case had squarely confronted the question of whether misuse of the material witness statute to investigate suspects violates the Constitution." *Id.* at 41a. Nevertheless, the majority reasoned that *Edmond* "put [petitioner] on notice that the material witness detentions—involving a far more severe seizure than a mere traffic stop—would be similarly subject to an inquiry into programmatic purpose." *Id.* at 43a. The court stated that the impermissibility of the alleged "pretext" policy was further established by "the history and purposes of the Fourth Amendment," *ibid.*, "the definition of probable cause," *id.* at 42a, and "dicta in a footnote of a district court opinion" from a different circuit. *Id.* at 46a (citing *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002),

rev'd on other grounds, 349 F.3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005)).

Finally, the court held that respondent had adequately alleged petitioner's responsibility for the false statements in the affidavit supporting the warrant application, rejecting petitioner's contention that this aspect of the complaint failed to satisfy the pleading standards set forth in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). Pet. App. 47a-56a.

b. Judge Bea dissented in relevant part. Pet. App. 64a-105a. He disagreed with the majority's conclusion that an arrest based on a valid material-witness warrant violates the Fourth Amendment if the prosecutor's subjective intent is to conduct further investigation. *Id.* at 68a. Judge Bea emphasized that this Court "has repeatedly stated that under the Fourth Amendment, an officer's subjective intentions are irrelevant so long as the officer's conduct is objectively justified." *Id.* at 70a-71a. In his view, the majority erred by "import[ing] the 'programmatic purpose' test" from cases testing "the constitutional validity of *warrantless* searches and seizures." *Id.* at 74a-75a. Judge Bea regarded those cases as having "no bearing * * * for the simple reason" that respondent "was arrested pursuant to a warrant issued by a neutral magistrate." *Id.* at 75a. Judge Bea also concluded that, even if the majority were correct in its Fourth Amendment analysis, it erred in concluding that the law was clearly established. *Id.* at 84a-86a.

Although Judge Bea deemed it unnecessary to reach the issue, he concluded that petitioner was also entitled to absolute immunity from the pretext claim insofar as it was based on petitioner's supervision of the prosecutors who sought the material witness warrant. Pet. App. 92a-104a. Judge Bea argued that the majority's inquiry

into the prosecutor's "immediate purpose" conflicted with precedent, lacked coherence as a doctrinal principle, and created perverse incentives for prosecutors to alter their decisions about trial strategy in order to avoid personal liability. See *id.* at 98a-104a.

On the claims alleging false statements in Special Agent Mace's affidavit, Judge Bea concluded that the "complaint simply does not state facts that plausibly establish" that petitioner, "'through [his] own actions,' violated [respondent's] rights." Pet. App. 87a (quoting *Iqbal*, 129 S. Ct. at 1948) (brackets in original). In particular, Judge Bea found nothing in respondent's allegations plausibly establishing that petitioner "knew of or encouraged his subordinates recklessly to disregard the truth in the preparation of supporting affidavits." *Id.* at 88a.

4. The court of appeals denied a petition for rehearing en banc. Pet. App. 106a.

a. Judge O'Scannlain dissented, joined by seven other judges. Pet. App. 122a-131a. The dissenting judges argued that, in denying petitioner qualified immunity on the pretext claim, the court had "distort[ed] the bedrock Fourth Amendment principle that an official's subjective reasons for making an arrest are constitutionally irrelevant." *Id.* at 126a. They also observed that by holding that the Fourth Amendment prohibits an arrest that the material witness statute permits, the court had "effectively declar[ed] the material witness statute unconstitutional, at least as applied to [respondent]." *Id.* at 125a. In the view of the dissenting judges, the court had "compound[ed] its error by holding that the right to be free from a detention under a pretextual material witness warrant was clearly established at the time of [respondent's] arrest." *Id.* at 128a.

b. Judge Gould dissented. Pet. App. 131a-132a. He expressed the concern that "[i]f an Attorney General of the United States can be held liable and subject to monetary damages primarily because of actions of law enforcement subordinates," then "it will become more difficult to persuade a person of great talent and integrity to leave his or her current occupation in order to hold the nation's highest law office." *Id.* at 132a.

SUMMARY OF ARGUMENT

The court of appeals held that petitioner, the former Attorney General of the United States, may be subjected to burdensome litigation, and potentially to personal liability for damages, based on an arrest that was authorized by a material-witness warrant issued by a federal magistrate judge pursuant to an Act of Congress. In reaching that conclusion, the court committed a series of fundamental legal errors.

I. This Court has held that a prosecutor is absolutely immune from suits for damages "when he acts within the scope of his prosecutorial duties." *Imbler* v. *Pachtman*, 424 U.S. 409, 420 (1976). Courts have uniformly recognized that seeking a material-witness warrant is a prosecutorial function that is protected by absolute immunity. The court of appeals in this case did not take issue with that general rule, but it held that the decision to seek such a warrant is undeserving of absolute immunity if a plaintiff alleges that the prosecutor's true purpose was to investigate or detain the person subject to the warrant. That holding is inconsistent with longstanding and uniform case law precluding examination of a prosecutor's motives in determining whether absolute immunity applies. Because improper purpose is "easy to allege and hard to disprove," *Hartman* v.

Moore, 547 U.S. 250, 257 (2006) (internal quotation marks omitted), the court's decision would substantially undermine the purpose of the absolute-immunity doctrine, subjecting prosecutors to burdensome litigation and discovery whenever plaintiffs allege an investigatory purpose.

II. Even if petitioner were not entitled to absolute immunity, the judgment below should be reversed for the independent reason that petitioner is entitled to qualified immunity.

The court of appeals held that the use of a valid material-witness warrant violates the Fourth Amendment if the prosecutor who seeks the warrant has an investigative purpose. That holding is inconsistent with repeated decisions of this Court establishing that the Fourth Amendment prescribes an objective inquiry under which an officer's subjective purpose is irrelevant. See, *e.g.*, *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004); *Whren* v. *United States*, 517 U.S. 806, 808-810 (1996). The court declined to follow those decisions, instead relying on *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), a case about suspicionless motor-vehicle checkpoints. Unlike the checkpoint seizures at issue in *Edmond*, however, a material-witness arrest is conducted on the basis of an individualized warrant issued by a neutral magistrate and subject to ongoing review.

The effect of the decision below is to invalidate the material-witness statute as it applies to the circumstances of this case. That holding is entirely unprecedented. The material-witness statute is based on a long-standing common-law practice that was codified in 1789 by the first Congress of the United States. All 50 States have adopted similar statutes, and until this decision, the constitutionality of those statutes "apparently has

never been doubted." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929). The court of appeals' erroneous Fourth Amendment ruling opens up virtually every material-witness warrant sought by a prosecutor to challenges—both when the warrant is issued and, after the fact, through damage actions—based on claims that the prosecutor has a investigatory or security motive.

The court of appeals compounded its error by concluding that its novel Fourth Amendment holding, supported principally by dicta in a footnote of a subsequently reversed district court decision, was sufficiently clearly established to impose personal monetary liability upon petitioner. In light of the absence of any precedent supporting the court's holding, it could hardly have been "clear to a reasonable officer" that the conduct alleged in this case was unlawful. *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001).

III. The court of appeals further erred in holding that petitioner could be held liable based on alleged misstatements made by his subordinates. The court's decision was based on a theory of supervisory liability that is directly contrary to *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and which respondent has not attempted to defend. Br. in Opp. i. Because respondent's concession has mooted the issue, if the court of appeals' judgment is not reversed on grounds of immunity, that aspect of the court's decision should be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

ARGUMENT

I. PETITIONER IS ENTITLED TO ABSOLUTE IMMUNITY FROM RESPONDENT'S CLAIM THAT HE SOUGHT A MATERIAL-WITNESS WARRANT FOR AN IMPROPER PURPOSE

A. Prosecutors Are Entitled To Absolute Immunity For Carrying Out Their Prosecutorial Functions

1. In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), this Court held that a prosecutor is absolutely immune from suits for damages "when he acts within the scope of his prosecutorial duties." *Id.* at 420. That immunity is based on a "well settled" common-law rule of prosecutorial immunity, *id.* at 424, and it rests on "the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties," *id.* at 422-423. Those considerations "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust," *id.* at 423, thereby "prevent[ing] the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system," *id.* at 427-428.

The Court in *Imbler* acknowledged that absolute immunity may "leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." 424 U.S. at 427. But the Court expressed agreement with Judge Learned Hand, who observed that it is "in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their

duty to the constant dread of retaliation." *Id.* at 428 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). The Court also noted that there are other checks on prosecutorial misconduct, including both punishment under criminal law and professional discipline. *Id.* at 429; see *Mitchell* v. *Forsyth*, 472 U.S. 511, 522-523 (1985) ("[T]he judicial process is largely self-correcting; procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.").

2. The Court in *Imbler* recognized that a prosecutor's duties are not limited to advocacy in court but also "involve actions preliminary to the initiation of the prosecution and actions apart from the courtroom." 424 U.S. at 431 n.33. In determining which actions by a prosecutor are protected by absolute immunity, the Court has taken a "functional approach," *Burns* v. *Reed*, 500 U.S. 478, 486 (1991), under which it "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)).

Absolute immunity protects prosecutors from liability whenever they are performing "the traditional functions of an advocate," *Kalina* v. *Fletcher*, 522 U.S. 118, 131 (1997), or are engaged in acts that are "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430. It therefore extends not only to the decision to initiate a prosecution by filing charging documents with the court, *Kalina*, 522 U.S. at 128-129, but also to any "duties of the prosecutor in his role as advocate for the State," *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). Those duties

"include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* at 273 (citation omitted). They also include making decisions about "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler*, 424 U.S. at 431 n.33.

The "functional" test for absolute immunity is an objective one: the prosecutor's subjective motive or intent is irrelevant in determining the nature of the function performed. See *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973) ("Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith."). Indeed, anything other than an objective standard would effectively defeat absolute immunity. As the Court has observed in the analogous context of legislative immunity, "absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'" *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54-55 (1998) (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951)) (brackets in original). For similar reasons, absolute judicial immunity cannot "be affected by the motives with which * * * judicial acts are performed." *Cleavinger* v. *Saxner*, 474 U.S. 193, 199-200 (1985) (quoting *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872)). The same principle applies to prosecutorial immunity. See *Butz* v. *Economou*, 438 U.S. 478, 509-510 (1978).

B. Seeking A Material-Witness Warrant Is A Prosecutorial Function

Seeking and obtaining a material-witness warrant is a core prosecutorial act, and a prosecutor is absolutely immune from any claims based on that act. A prosecutor's decision that the testimony of a particular witness is necessary to an ongoing criminal proceeding falls squarely within the prosecutor's "traditional functions as an advocate." *Imbler*, 424 U.S. at 431 n.33. As this Court has observed, those functions include deciding "which witnesses to call." *Ibid.*

Nor can it be doubted that seeking and obtaining a material-witness warrant from a judicial officer in the context of a criminal proceeding is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; see *Burns*, 500 U.S. at 487 (applying absolute immunity to a prosecutor's "participation in a probable-cause hearing, which led to the issuance of a search warrant"). An application for a material-witness warrant requires an affidavit showing that "the testimony of a person is material in a criminal proceeding," and the warrant itself is issued by "a judicial officer" presiding over that criminal proceeding. 18 U.S.C. 3144. Thus, a prosecutor's decision to seek such a warrant occurs in the context of a specific proceeding, and it requires a showing that the warrant is germane to those proceedings. It is therefore not surprising that (apart from the prior rulings in this case) the federal courts have uniformly held that a prosecutor's decision to seek a material-witness arrest warrant is protected by absolute immunity. See, *e.g.*, *Betts* v. *Richard*, 726 F.2d 79, 81 (2d Cir. 1984); *Daniels* v. *Keiser*, 586 F.2d 64, 68-69 (7th Cir. 1978), cert. denied, 441 U.S. 931

(1979); cf. *White* v. *Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988), cert. denied, 489 U.S. 1028 (1989).

C. Petitioner Is Entitled To Absolute Immunity For Claims Based On An Alleged Policy Governing Material-Witness Warrants

In light of the principles explained above, there can be little doubt that the actions of the Assistant United States Attorney in deciding to seek a material-witness warrant for respondent, preparing the warrant application, and presenting it to the court were covered by absolute immunity. Indeed, respondent did not even attempt to name the lead prosecutor as a defendant in this action. As the former Attorney General of the United States, petitioner is entitled, at the very least, to the same immunity as the Assistant United States Attorney.

1. This Court has held that "supervisory prosecutors are immune in a suit directly attacking their actions related to an individual trial." *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 862 (2009). In *Goldstein*, a criminal defendant sought damages against a district attorney for allegedly failing to train and supervise his deputies to ensure that they would disclose impeachment material to defense counsel, as required by *Giglio* v. *United States*, 405 U.S. 150 (1972). 129 S. Ct. at 861. Even though the claim concerned "the office's administrative procedures," the Court held that "the prosecutors involved in such supervision or training * * * enjoy absolute immunity." *Id.* at 861-862. The Court reasoned that the administrative tasks at issue were "directly connected to the conduct of a trial," and it observed that "an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim." *Id.* at 862.

Under *Goldstein*, an attorney setting policies or providing instructions about a prosecutorial act is entitled to absolute immunity. A plaintiff cannot defeat absolute immunity simply by alleging the existence of a broad policy concerning a prosecutorial action, otherwise plaintiffs could plead around such immunity in a variety of cases. As *Goldstein* makes clear, even if the claim involves "*general* methods of supervision and training," that "does not preclude an intimate connection between prosecutorial activity and the trial process." 129 S. Ct. at 862-863. Instead, managerial acts or general policies that involve the conduct of trials are covered by absolute immunity when they are "directly connected to the prosecutor's basic trial advocacy duties." *Id.* at 863.

Respondent's claims in this case are based on an alleged policy developed by petitioner that was "directly connected with the conduct of a trial," 129 S. Ct. at 862 —that is, to the quintessentially prosecutorial function of seeking material-witness warrants. See J.A. 39 (alleging that petitioner "routinely used the material witness statute in numerous new, unlawful ways," including "to arrest and hold individuals" the government wished to investigate); J.A. 41 (alleging that petitioner developed a policy to "use the material witness statute to arrest and detain terrorism *suspects*"); J.A. 48-49 (alleging that petitioner "was a principal architect of, authorized and set into motion, these policies and practices regarding the material witness statute, and had responsibility for their implementation and administration"). Under *Goldstein*, those claims—no less than any claims challenging an individual prosecutor's decision to seek a material-witness warrant in an individual case—are barred by absolute immunity.

2. Respondent argued below that, even if a prosecutor generally would be absolutely immune for seeking a material-witness warrant, petitioner is not entitled to absolute immunity because he was not only the Nation's chief prosecutor but also its chief law-enforcement officer, with authority over the FBI. Resp. C.A. Br. 25-27. That argument lacks merit because the absolute-immunity analysis focuses on "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127. The function at issue here is inherently prosecutorial, and thus any additional duties the Attorney General has are of no moment.

In any event, the complaint makes clear that it was the Assistant United States Attorney, and not the FBI, who submitted the application for a material-witness warrant in this case. J.A. 23-24. Although law-enforcement officials assist prosecutors in obtaining material-witness warrants—for instance, by gathering facts and preparing supporting affidavits—it is the prosecutor who ultimately decides whether to seek such a warrant, and it is that act that provides the basis for petitioner's claim. That quintessentially prosecutorial function does not lose its prosecutorial character merely because law-enforcement officers also play a role in the process.[4]

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[4] This Court has drawn a distinction for absolute-immunity purposes between prosecutors, who are subject to specialized discipline, and law-enforcement officials. See *Malley* v. *Briggs*, 475 U.S. 335, 343 n.5 (1986) ("The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. * * * [A] prosecutor stands perhaps unique * * * in his amenability to professional discipline by an association of his peers. The absence of a comparatively well developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.") (internal quotation marks and citation omitted).

D. The Court Of Appeals Erred In Denying Absolute Immunity On The Basis Of The Alleged Purpose Of The Prosecutor In Seeking A Material-Witness Warrant

The court of appeals did not question the proposition that seeking a material-witness warrant generally falls within the category of prosecutorial actions to which absolute immunity applies. Instead, the court minted its own novel exception to the immunity rule, holding that a prosecutor loses immunity for seeking a material-witness warrant if the "immediate purpose" of the warrant is not to secure a person's presence for a criminal proceeding, but "to investigate or preemptively detain a suspect." Pet. App. 25a. The court's "immediate purpose" analysis effectively replaces the simple legal inquiry into the "nature of the function being performed," *Buckley*, 509 U.S. at 269, with a complicated factual inquiry into the subjective "purposes" of the prosecutor. That approach not only conflicts with bedrock immunity principles; it also frustrates the purposes of absolute immunity by exposing prosecutors to suit for decisions about trial strategy.

1. The "immediate purpose" exception created by the court of appeals is contrary to this Court's precedent. As explained above, see p. 16, *supra*, it is well established that the scope of absolute immunity does not turn on motive or intent. Consistent with that principle, no other court of appeals has adopted the "immediate purpose" approach of the court below, and several courts of appeals have expressly rejected the suggestion that a prosecutor's intent has any relevance to the absolute immunity analysis. See, *e.g.*, *Bernard* v. *County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) (The "fact that improper motives may influence" a prosecutor's exercise of discretion "cannot deprive him of absolute immu-

nity."); *Austin Mun. Sec., Inc.* v. *National Ass'n of Sec. Dealers*, 757 F.2d 676, 685 (5th Cir. 1985) ("[T]he intent with which * * * defendants operate is irrelevant to the absolute immunity issue."); *Ashelman* v. *Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc) ("Intent should play no role in the immunity analysis.").

The court of appeals stated that the cases eschewing inquiry into a prosecutor's intent have involved "allegations that the otherwise prosecutorial action was secretly motivated by malice, spite, bad faith, or self-interest," whereas this case involved an attempt to discern whether a prosecutor was exercising "*investigative* or *national security* functions." Pet. App. 19a. But there is no basis for the court's apparent view that inquiry into the motives of the prosecutor is permissible for some purposes but not for others. Under the decision below, a prosecutor who sought a material-witness warrant for retaliatory reasons, or even out of racial animus, would receive absolute immunity because his conduct would not be "investigative." But a prosecutor who performed exactly the same function, in precisely the same circumstances and at the same stage of the proceedings, would receive no such protection if he acted with the intent to further an ongoing criminal investigation. That perverse result finds no support in law or logic.

2. The court of appeals premised its "immediate purpose" test on language in *Buckley*, Pet. App. 19a-20a, but that case does not support the court's approach. In *Buckley*, this Court held that prosecutors were not entitled to absolute immunity against claims that, in analyzing crime-scene evidence, they "conspired to manufacture false evidence" implicating the defendant. 509 U.S. at 272. The Court observed that "[t]here is a difference between the advocate's role in evaluating evidence and

interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Id.* at 273. The Court noted that the prosecutors' "mission at the time" they allegedly fabricated evidence "was entirely investigative in character." *Id.* at 274. The Court further explained that the subsequent convening of a grand jury did not make the prosecutor's alleged fabrication of evidence a prosecutorial act. *Id.* at 275. In reaching that conclusion, the Court emphasized that the grand jury was empaneled "well after the alleged fabrication of false evidence," adding that the "immediate purpose" of the grand jury was "to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." *Ibid.*

The court of appeals seized on this Court's statements about the *Buckley* prosecutors' "mission" and the "immediate purpose" of the grand jury, but it disregarded the context in which those statements were made. This Court emphasized in *Buckley* that its determination of the nature of the acts at issue turned on "[a] careful examination of the allegations concerning the *conduct* of the prosecutors," based on objective factors such as whether they had probable cause to arrest and whether judicial proceedings were pending at the time. 509 U.S. at 274 (emphasis added). Nothing in *Buckley* suggests that it is appropriate for a court to examine the state of mind of individual prosecutors to discern whether, although they were engaged in conduct that is a core part of the advocacy function, their true intent in doing so was "investigative."

3. The approach taken by the court of appeals would seriously undermine the purposes of absolute prosecutorial immunity. That immunity rests on important public-policy considerations, including the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. Moreover, allowing liability to be based on a prosecutor's actions in early phases of a criminal case could have dangerous ramifications for later phases of the case. As the Court has recognized, "[e]xposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability." *Malley* v. *Briggs*, 475 U.S. 335, 343 (1986). For example, a prosecutor may forgo seeking a material-witness warrant, and potentially lose an important witness in a case, out of concern that seeking such a warrant may expose him or his supervisors to suit and potentially to liability. Likewise, a prosecutor who sought a material-witness warrant may feel compelled to call that witness at trial, even if developments that occur at trial make the witness's testimony unnecessary. In that scenario, the prosecutor could be concerned that failure to call the witness would lead to an adverse inference that the arrest under the warrant was pretextual and that the true basis for the arrest was an investigatory or security purpose.

To protect against vexatious litigation and harassment, absolute immunity protects prosecutors not just from liability but also from the burdens of defending a

lawsuit. As Judge Bea recognized, however, making the availability of immunity turn on the prosecutor's intent would require "precisely the kind of expensive discovery and litigation [that] immunity was designed to avoid." Pet. App. 103a (dissenting opinion); see *Bogan*, 523 U.S. at 54-55 ("'The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'") (quoting *Tenney*, 341 U.S. at 377). Improper purpose, after all, is "easy to allege and hard to disprove." *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (internal quotation marks omitted).

In the qualified-immunity context, this Court has explained that "'subjective' inquiries of th[e] kind" required by the decision below incur not only "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," but also "special costs" involved in investigating subjective motivation that are "peculiarly disruptive of effective government." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816-817 (1982). Moreover, "there often is no clear end to the relevant evidence"—an inquiry "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* at 817. Such questions "rarely can be decided by summary judgment." *Id.* at 816.

Such observations apply with even greater force to a supervisory prosecutor such as the Attorney General, who is called upon to make countless policy choices con-

cerning the initiation and conduct of prosecutions.[5] Permitting courts to examine the "immediate purpose" behind the policy decisions related to prosecution would allow litigants to haul the Attorney General into court for every such decision. This Court has already recognized that prosecutors are ripe targets for such lawsuits, and these concerns are heightened for the Attorney General. See *Goldstein*, 129 S. Ct. at 860 (noting "the frequency with which criminal defendants bring * * * suits [against prosecutors], and the substantial danger of liability, even to the honest prosecutor") (internal quotation marks and citation omitted).

Significantly, the rationale of the decision below is not limited to the decision to seek a material-witness warrant. For example, prosecutors routinely bring charges against lower-level offenders in circumstances where defendants could allege that their "immediate purpose" is not to proceed with a prosecution but to obtain information about more valuable suspects or to enlist the defendant in investigative efforts. Under the decision below, such motives would expose the prosecutor to suit on claims seeking damages for vindictive or retaliatory prosecution. The court of appeals acknowledged that consequence of its reasoning but simply declared that "while a prosecutor who files charges may hope, eventually, that the petty crook will implicate his boss, the *immediate* purpose of filing charges is to *begin a prosecution*—the better to pressure the defendant into providing information." Pet. App. 25a. But that *ipse dixit* has no principle behind it, as Judge Bea ob-

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[5] In Fiscal Year 2010, the Department of Justice opened or received approximately 160,000 matters for criminal investigation involving nearly 200,000 individuals and entities. Federal prosecutors filed nearly 70,000 criminal cases against approximately 90,000 defendants

served. *Id.* at 103a (dissenting opinion) ("[W]hy isn't the prosecutor's 'immediate purpose' in this case to secure a witness's appearance at trial rather than to obtain evidence against [respondent]?"). Identifying the "immediate purpose" of a prosecutorial action is both impossible and unnecessary—the prosecutor's purposes, whether "immediate" or not, have no role in the objective, functional test for absolute immunity.

II. EVEN IF PETITIONER WERE NOT ENTITLED TO ABSOLUTE IMMUNITY, QUALIFIED IMMUNITY WOULD BAR RESPONDENT'S CLAIM

A. Qualified Immunity Protects Officers Unless Their Conduct Violated Clearly Established Constitutional Rights

This Court has been acutely sensitive to "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974). Accordingly, government officials performing discretionary functions enjoy qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). If "officers of reasonable competence" could have disagreed about whether the alleged action violated the plaintiff's constitutional or statutory rights, "immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Qualified immunity is not merely a defense to liability; it protects officials from the entirety of the litigation process. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Personal-liability lawsuits against government officials exact "substantial social costs," including "the expenses

of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. To minimize those costs, this Court has repeatedly emphasized that a claim of qualified immunity must be resolved at the earliest possible stage of the litigation and that "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right. *Id.* at 818; *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996).

The policies underlying qualified immunity are particularly implicated, and vigorous application of qualified immunity is particularly important, when actions are brought against Cabinet-rank officials. The already substantial costs of subjecting a government official to suit for the performance of his duties are amplified when the official's position includes the important responsibility of presiding over a federal agency. See *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888) ("Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates."); Pet. App. 132a (Gould, J., dissenting from the denial of rehearing en banc). That is especially true when, as in this case, the officials are required to respond to national crises that require applying the law to novel factual situations.

In determining whether an official has qualified immunity, the usual first step is to inquire "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). If the plaintiff has asserted a constitutional violation, the inquiry then focuses on the "objective legal reasonableness" of the defendants' conduct in light of clearly estab-

lished law. *Harlow*, 457 U.S. at 819. As we next show, the court of appeals erred at both stages of that analysis.[6]

B. An Arrest Based On A Material-Witness Warrant Does Not Violate The Constitution, Whatever The Subjective Motives Of The Prosecutor

The court of appeals held that an arrest based on a material-witness warrant violates the Fourth Amendment where the warrant is not being used for its "stated purpose," but for the purpose of investigating the individual subject to the warrant. Pet. App. 40a. In the court's view, the existence of an investigatory motive, by itself, invalidates an otherwise-valid material-witness warrant. That conclusion is inconsistent with numerous decisions of this Court establishing that the validity of

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[6] There is no mandatory sequence for considering the two components of the qualified-immunity analysis, and therefore this Court could reverse the judgment of the court of appeals either on the ground that respondent failed to allege a violation of his Fourth Amendment rights or on the ground that any rights that were violated were not clearly established. See *Pearson* v. *Callahan*, 129 S. Ct. 808, 818 (2009). Nevertheless, addressing the first question—that is, whether respondent has alleged a constitutional violation—is appropriate here because it would "promote[] the development of constitutional precedent * * * with respect to [a] question[] that do[es] not frequently arise in cases in which a qualified immunity defense is unavailable." *Ibid.* It is particularly important here that this Court address the first step of the qualified-immunity inquiry, since a ruling that petitioner is immune because the law was not "clearly established" at the time of the alleged events, if it left the constitutional ruling of the court of appeals otherwise intact, could have significant adverse consequences. As we discuss below, see pp. 38-40, *infra*, the court of appeals' constitutional decision opens every material witness warrant sought by a prosecutor to challenges based on claims that the prosecutor has an investigatory or security motive.

a seizure under the Fourth Amendment is not affected by the subjective motives of the officer conducting it. If allowed to stand, it would seriously undermine the purposes of the material-witness statute.

1. The court of appeals did not question the facial constitutionality of the material-witness statute, Pet. App. 31a-32a, and with good reason. The authority to arrest material witnesses was "the long established rule in English Law, in effect when the United States became a nation." *Bacon* v. *United States*, 449 F.2d 933, 938-939 (9th Cir. 1971). The First Congress provided such authority in the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91, and "[t]he constitutionality of this statute apparently has never been doubted." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929); see *Hurtado* v. *United States*, 410 U.S. 578, 588 (1973). All 50 States have enacted similar statutes. *Bacon*, 449 F.2d at 939.

The court of appeals instead held that even a facially valid material-witness warrant violates the Fourth Amendment if the prosecutor intended to investigate the witness on suspicion of a crime. Significantly, the court did not suggest that the warrant issued in this case somehow failed to comply with 18 U.S.C. 3144. And although respondent alleged that petitioner adopted a policy directing Department of Justice officials to seek material-witness warrants "as a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or to investigate for possible criminal wrongdoing (*i.e.*, to arrest 'suspects')," J.A. 39-40, his complaint contained no allegation that petitioner directed or encouraged officials to seek material-witness warrants in cases where the statutory requirements for the issuance of such warrants were not satisfied.

Respondent did allege that the affidavit submitted in his case contained false statements and omissions. J.A. 25. But he did not allege that petitioner had any involvement in the preparation or submission of that affidavit, or that petitioner directed, participated in, or even knew of the decision to seek a material-witness warrant for him. Accordingly, he failed to provide "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face'" based on a theory that petitioner, "through [his] own individual actions, has violated the Constitution." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948-1949 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)); see Pet. App. 90a (Bea, J., dissenting) ("[N]one of the allegations contain facts that plausibly establish [petitioner's] knowledge that his subordinates were obtaining material witness warrants on the basis of deliberately or recklessly false evidence or on facially invalid warrants."). And in his brief in opposition in this Court, petitioner expressly abandoned any claims against petitioner based on alleged false statements or omissions in the warrant affidavit. Br. in Opp. i. Petitioner's only remaining claim, therefore, is that an arrest based on a *valid* material-witness warrant—that is, a warrant that complies with the requirements of Section 3144—violates the Fourth Amendment if the prosecutor who seeks the warrant does so for the purpose of investigating or preventively detaining the individual subject to the warrant.

2. In holding that petitioner had established a violation of the Fourth Amendment, the court of appeals disregarded this Court's repeated decisions establishing that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objec-*

tively, justify [the] action.'" *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (quoting *Scott* v. *United States*, 436 U.S. 128, 138 (1978); see *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment."); *Graham* v. *Connor*, 490 U.S. 386, 397 (1989). In *Whren* v. *United States*, 517 U.S. 806 (1996), for example, this Court held that officers did not violate the Fourth Amendment when they stopped the defendant's vehicle for a traffic violation, even though they allegedly conducted the stop "as [a] pretext[] for pursuing other investigatory agendas," *id.* at 811. The Court observed that it has "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers," *id.* at 813, noting that "[n]ot only have we never held, outside the context of inventory search or administrative inspection * * * that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary," *id.* at 812.

The Court reaffirmed that principle in *Devenpeck* v. *Alford*, 543 U.S. 146 (2004), concluding that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause," *id.* at 153. The Court held that, where probable cause supported an arrest of the defendant for impersonating a police officer, the fact that the arresting officer intended to arrest the defendant for tape recording a conversation (which was not in fact illegal) did not render the arrest unlawful. The Court explained that the "[s]ubjective intent of the arresting officer, however it is determined * * * is simply no basis for invalidating an arrest." *Id.* at 154-155.

The court of appeals stated that the rule articulated in *Whren* and *Devenpeck* does not apply here because those cases involved arrests based on "probable cause to *believe that a violation of law has occurred*." Pet. App. 32a (quoting *Whren*, 517 U.S. at 811). The court reasoned that "[a]n arrest of a material-witness is not justified by probable cause because the two requirements of Section 3144 (materiality and impracticability) do not constitute the elements of a crime." *Id.* at 34a. The court concluded that because a material-witness arrest is not supported by "suspicion of wrongdoing," the applicable Fourth Amendment standard was supplied by cases involving warrantless searches at motor vehicle checkpoints, as to which "'an inquiry into purpose at the programmatic level'" is appropriate under *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000). Pet. App. 36a (quoting *Edmond*, 531 U.S. at 46).

That reasoning is doubly flawed. First, the "programmatic purpose" standard of *Edmond* applies only to seizures that lack *any* individualized basis, such as drug or alcohol checkpoints, and that may be justified, if at all, by the generalized interest that motivates the program under which they are conducted. Such searches are governed by different rules because they require "a constitutionally adequate substitute for a warrant." *New York* v. *Burger*, 482 U.S. 692, 710 (1987); see Pet. App. 75a-76a (Bea, J., dissenting) ("The 'programmatic purpose' inquiry is necessary to test the validity of a special needs search precisely because such searches occur without the procedural protections of the warrant requirement and the magisterial supervision it entails.").

Unlike the roadblock seizures in *Edmond*, a material-witness arrest is conducted based on a warrant

issued by a neutral magistrate. A judicial officer evaluates the warrant application, together with the evidence, to determine whether the testimony of the witness is "material in a criminal proceeding" and whether "it may become impracticable to secure the presence of the [witness] by subpoena." 18 U.S.C. 3144. A judicial officer conducts a hearing at which the material witness may be heard. The court may set conditions of release and may revisit its rulings at any time to account for changed circumstances. *Ibid.* ("No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice."); see 18 U.S.C. 3142(b) (mandating release "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

Although a material-witness warrant does not require probable cause to believe that the subject of the warrant has committed a crime, it is hardly unique in that respect. See, *e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 554 (1978) (holding that a search can be justified on the basis of probable cause to believe that the premises contain evidence of a crime by a third party, even if the owner is not suspected of wrongdoing); *Maag* v. *Wessler*, 960 F.2d 773, 776 (9th Cir. 1992) (officer may arrest individual who appears to be a danger to himself as a result of mental illness). For present purposes, the relevant characteristic of a material-witness arrest is that it is supported by an individualized justification, making *Whren* fully applicable. See *United States* v. *Knights*, 534 U.S. 112, 122 (2001) (citing *Whren* for the

proposition that "there is no basis for examining official purpose" in evaluating a search of a probationer based only on reasonable suspicion).

Second, even if *Edmond* were relevant here, the court of appeals' application of the "programmatic purpose" test was nevertheless erroneous. The program at issue in *Edmond* was a police practice of erecting random roadblocks intended to catch drug offenders. In evaluating the purpose of that policy, this Court "caution[ed] that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." 531 U.S. at 48. In other words, the Court approved of asking why Indianapolis had chosen to institute the program, but it did not approve of asking why a particular officer conducted a seizure under it.

Here, the "program" at issue is the material-witness statute, which Congress enacted to provide prosecutors with a means of ensuring that key witnesses would appear at trial. That "programmatic" purpose—Congress's purpose—is consistent with the Fourth Amendment, and neither the court of appeals nor respondent has suggested otherwise. The court of appeals, however, went beyond such an inquiry into purpose "at the programmatic level" and concluded that respondent's arrest was invalid because the particular prosecutors who sought it were motivated by reasons other than those for which the statute was intended. That is equivalent to "prob[ing] the minds of individual officers acting at the scene"—precisely what *Edmond* does not condone. 531 U.S. at 48.

3. Although the court of appeals did not explicitly acknowledge it, the effect of its Fourth Amendment holding was to invalidate the material-witness statute as

applied to the circumstances of this case. The court did not construe the material-witness statute to limit material-witness arrests to those in which the prosecutor acts with a non-investigative purpose. Rather, as Judge Bea pointed out, the court held that "*even if* the material witness warrant on which he was detained was objectively valid and supported by probable cause, the prosecutor's subjective intention to use the material witness warrant to accomplish other, law-enforcement objectives renders the government's conduct unconstitutional." Pet. App. 70a (dissenting opinion).[7] The as-applied unconstitutionality of Section 3144 necessarily follows from the court's holding that the Fourth Amendment prohibits an arrest that the statute permits. But as discussed above, see p. 30, *supra*, the material-witness statute reflects a well-established common-law practice, and the statute itself has been in existence since 1789. Not only has the constitutionality of the statute "never been doubted," *Barry*, 279 U.S. at 617, but this Court has repeatedly rejected constitutional challenges to material-witness detentions.

In *New York* v. *O'Neill*, 359 U.S. 1 (1959), for example, this Court addressed Florida's Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, a statute adopted in nearly every State, which enabled a judge of one State

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[7] In an opinion concurring in the denial of rehearing en banc, Judge Smith, writing only for himself, argued that "[t]he material witness statute [itself] does not authorize arrests like the one in this case" and therefore that the panel had not "address[ed] the validity" of the law. Pet. App. 113a-114a (emphasis omitted). But Judge Smith did not explain how the text of the statute prohibits such an arrest when a magistrate issues a warrant after determining that all of the statutory criteria have been satisfied.

to certify "the necessity of the appearance of [a] witness in a criminal prosecution or grand jury investigation," and enabled the State where that witness could be found to "take the witness into immediate custody" and "deliver the witness to an officer of the requesting State." *Id.* at 4-5. The Court held that the statute did not violate the Privileges and Immunities Clause, observing that "Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State." *Id.* at 7. The Court added that "[a] citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found. There is no constitutional provision granting him relief from this obligation to testify even though he must travel to another State to do so." *Id.* at 11; see *Stein* v. *New York*, 346 U.S. 156, 184 (1953) ("The duty to disclose knowledge of crime * * * is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."), overruled in part on other grounds, *Jackson* v. *Denno*, 378 U.S. 368 (1964).

In *Barry*, this Court upheld the Senate's authority to detain a material witness. Recognizing that "a court has power in the exercise of its sound discretion to issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise the witness will not be forthcoming," 279 U.S. at 616, the Court stated that "[t]he validity of acts of Congress authorizing courts to exercise the power in question * * * seems to be established," *id.* at 618; see *id.* at 617 ("Similar statutes exist in many of the states and have been enforced without question."). The Court concluded that the Senate "may exercise in its own right the incidental

power of compelling the attendance of witnesses." *Id.* at 619.

As those cases demonstrate, there is no constitutional violation in detaining a material witness if the standards of 18 U.S.C. 3144 are satisfied. The court of appeals' decision that a warrant issued under that statute may be invalidated on the basis of the motive of the prosecutor (or the prosecutor's supervisor) is therefore incorrect.

4. The decision below would seriously limit the circumstances in which prosecutors could invoke the material-witness statute without fear of personal liability. Individuals who have information critical to a prosecution often happen to be suspects in the underlying criminal investigation. Such individuals may become the subject of a material-witness warrant if there is reason to believe that, because they face potential criminal liability, they may flee the jurisdiction or refuse to respond to a subpoena. The reasoning of the court of appeals, however, suggests that such individuals would be able to contest the warrant by demanding an intrusive inquiry into the prosecutor's motive, making implementation of the material-witness statute more cumbersome and potentially delaying prosecutions. It also suggests that prosecutors will be subject to suit if they lack probable cause to charge such an individual but arrest him on a material-witness warrant—even though that warrant is issued by a neutral judge based on an application that satisfies the requirements of 18 U.S.C. 3144. Indeed, the reasoning would produce the upside-down result that those who are potential suspects would have a greater ability to sue than those who are not.

The court of appeals' analysis thus creates legal uncertainty in frequent applications of the material-wit-

ness statute. To take one example, federal agents initially detained Terry Nichols based on a material-witness warrant just days after the 1995 Oklahoma City bombing. See *United States* v. *McVeigh*, 940 F. Supp. 1541, 1548 (D. Colo. 1996). Although Nichols was implicated as a possible participant in the bombing because of his association with Timothy McVeigh, agents acknowledged that they lacked probable cause to hold Nichols in custody unless they arrested him as a material witness. *Ibid.* After further investigation after his arrest under the material-witness statute, the government developed sufficient evidence to obtain a new arrest warrant on a criminal complaint alleging Nichols's direct involvement in the bombing. See *In re Material Witness Warrant*, 77 F.3d 1277, 1278-1279 (10th Cir. 1996). Under the reasoning of the court of appeals, however, Nichols could have challenged the material-witness warrant on the ground that the prosecutors who obtained it had an investigatory purpose, and he also would have had a cause of action for damages against (and presumably the right to seek discovery from) the prosecutors based on an allegation of such a purpose.

Although the court of appeals did not specify how its analysis applies when a prosecutor acts with mixed motives in seeking a material-witness warrant, the fear of personal liability may dissuade prosecutors from obtaining such a warrant when they harbor any suspicion that the subject might be involved in criminal wrongdoing but do not yet have probable cause to bring criminal charges. That is especially so because prosecutors often do not know in advance whether a witness they believe to be material will in fact need to testify at trial. Thus, even prosecutors who have no investigatory purpose could be subject to hard-to-disprove allegations of such

a purpose if circumstances change and a material witness does not need to be called. The court's flawed Fourth Amendment analysis would therefore discourage prosecutors from employing the material-witness statute in situations for which it was designed and in which the public interest favors its use.

C. Even If The Use Of A Material-Witness Warrant For Investigatory Purposes Violated The Constitution, Petitioner Would Be Entitled To Qualified Immunity

Even if the Fourth Amendment prohibited the use of material-witness warrants in cases where the prosecutor has the "immediate purpose" of investigating or detaining the witness, petitioner would be entitled to qualified immunity because that constitutional rule was not clearly established at the time of respondent's arrest. As this Court has explained, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)) (emphasis added). That inquiry "must be undertaken in light of the *specific context of the case*, not as a broad general proposition." *Ibid.* (emphasis added); accord *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). Thus, "if officers of reasonable competence could disagree" about whether the challenged conduct was unlawful, "immunity should be recognized." *Malley*, 475 U.S. at 341. Under those standards, petitioner is entitled to qualified immunity on respondent's Fourth Amendment claim.

The court of appeals acknowledged that, in March 2003, no case had "squarely confronted the question of whether misuse of the material witness statute to investigate suspects violates the Constitution," but the court was untroubled by the absence of cases supporting its conclusion. Pet. App. 41a. Instead, the court suggested that the lack of precedent was "due more to the obviousness of the illegality than the novelty of the legal issue." *Ibid.* (quoting *Moreno* v. *Baca*, 431 F.3d 633, 641 (9th Cir. 2005), cert. denied, 547 U.S. 1207 (2006)). But the "illegality" of petitioner's conduct was so far from "obvious" that eight judges on the court found no constitutional violation at all—a fact that, by itself, casts serious doubt on the court of appeals' decision. See *Wilson*, 526 U.S. at 618 (When "judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy.").

The only case the court of appeals identified as even remotely addressing the "specific context of [this] case," *Brosseau*, 543 U.S. at 198, was a district court decision from another circuit that, in dicta in a footnote, suggested that "[r]elying on the material witness statute to detain people * * * in order to prevent potential crimes is an illegitimate use of the statute." *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002), rev'd on other grounds, 349 F.3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005). The district court in that case did not specify in what sense such a use of the statute would be "illegitimate," and it did not state that it would be unconstitutional. More to the point, as Judge O'Scannlain observed in dissenting from the denial of rehearing en banc, the "assertion that three sentences of dicta in a footnote to a subsequently

reversed district court opinion clearly established a right that the majority expended nearly three-thousand words describing is truly astonishing." Pet. App. 129a.

The other sources on which the court of appeals relied in deeming respondent's purported Fourth Amendment rights "clearly established" do not support that conclusion. As Judge O'Scannlain explained, the "history and purposes of the Fourth Amendment" and the "definition of probable cause," both of which the court invoked, Pet. App. 42a-43a, are far too general to establish the illegality of respondent's arrest in the particular circumstances of this case, *id.* at 128a (opinion dissenting from the denial of rehearing en banc) ("If [those sources are] sufficient clearly to establish how the Fourth Amendment applies in a particular setting, then how can *any* Fourth Amendment rule ever *not* be 'clearly established?'"). The court also reasoned that *Edmond* "should have been sufficient to put [petitioner] on notice that the material witness detentions," like administrative or special-needs searches, "would be similarly subject to an inquiry into programmatic purpose." *Id.* at 43a. But while the "programmatic purpose" test announced in cases such as *Edmond* may have been clearly established in the roadblock and administrative search contexts, it was not clearly established whether, much less how, that framework applied to arrests based on material-witness warrants.

Indeed, at the time of respondent's arrest, at least one court of appeals had rejected the contention that an intent to investigate an individual as a suspect invalidates a material-witness warrant. In *United States ex rel. Glinton* v. *Denno*, 339 F.2d 872, 875 (2d Cir. 1964), cert. denied, 381 U.S. 929 (1965), a criminal defendant originally detained as a material witness argued that "it

is irrelevant that the police complied with the technicalities of the material witness statute, because as the 'target' of the grand jury proceeding he could not have been summoned to testify, * * * and therefore could not be held as a witness." But the Second Circuit held that "[t]his argument has no merit." *Ibid.* The court deemed persuasive the decision in *People* v. *Perez*, 90 N.E. 2d 40, 46 (N.Y. 1949), in which the court upheld a practice almost identical to that alleged here: "While the police may have suspected defendant of the murder, they did not have enough evidence to hold him as a defendant until shortly before he confessed. His detention during that period was lawful because, in light of his admitted knowledge of many of the circumstances surrounding the murder, his commitment as a material witness was valid." *Ibid.* In light of that decision and the absence of any contrary precedent, it could hardly have been "clear to a reasonable officer" that the conduct alleged in this case was unlawful. *Saucier*, 533 U.S. at 202.

III. THIS COURT SHOULD VACATE THE PORTION OF THE DECISION BELOW ADDRESSING SUPERVISORY LIABILITY

As explained in the petition for a writ of certiorari (at 30-33), the court of appeals erred in concluding that petitioner can be held responsible for alleged false statements and omissions in the affidavit submitted by subordinate officials in support of the warrant to arrest respondent. The court's decision was based on a theory of supervisory liability that is directly contrary to this Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). Respondent has not attempted to defend that aspect of the decision below, instead declaring (Br. in Opp. i) that he "will not pursue the claims in Question

3"—that is, the supervisory-liability question—before this Court and "will abandon the claim in Question 3 in any further proceedings in the district court or Ninth Circuit." In light of respondent's concession, that aspect of the decision below did not warrant plenary review, and this Court granted certiorari "limited to Questions 1 and 2 presented by the petition." Nevertheless, because respondent has mooted the supervisory-liability issue, that aspect of the court of appeals' decision should be vacated. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Accordingly, if this Court does not reverse the judgment below on the basis of immunity, it should, at a minimum, vacate the portion of the court of appeals' decision addressing supervisory liability.

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the portion of the decision below addressing supervisory liability should be vacated. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Respectfully submitted.

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DECEMBER 2010

RESPONDENT'S BRIEF

No. 10-98

Supreme Court, U.S.
JAN 21 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

—v.—

ABDULLAH AL-KIDD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT

Respondent's core allegation is that petitioner authorized the systematic use of the material witness statute to detain and investigate suspects whom the government lacked probable cause to charge with a crime, and not to secure testimony from witnesses. Notably, petitioner does not dispute the plausibility of that allegation, and thus, does not contend that the allegation fails to satisfy the pleading requirements set forth in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *See* Pet. Br. 43-44; Pet. (I) (raising *Iqbal* claim only as to petitioner's responsibility for the veracity of the affidavit, a claim that respondent is not pursuing).

A. The Complaint's Allegations.

1. Respondent is a U.S. citizen born in 1972 in Kansas. His parents, siblings and two children are also native-born U.S. citizens who have always resided in the United States. While attending the University of Idaho in the mid-1990s, respondent changed his name from Lavoni T. Kidd to Abdullah al-Kidd and converted to Islam. *See* J.A. 22-23 (First Amended Complaint (FAC) ¶¶ 39-40).

Following September 11, the government conducted surveillance of respondent as part of a broad "Idaho" probe. J.A. 23 (FAC ¶¶ 43-44). The surveillance logs from that investigation indicated no illegal activity by respondent, and he was not charged with a crime, then or since. J.A. 14, 23 (FAC ¶¶ 9, 44).

In March 2003, respondent was preparing to travel to Saudi Arabia to further his language and religious studies on a scholarship at a well-known university. While at the airport, respondent was arrested by FBI agents on a material witness warrant issued in Idaho in the case of Sami Al-Hussayen, who had been indicted for visa fraud and making false statements to the government, but was never convicted of those charges or any of the other subsequently added charges. J.A. 23-24, 29, 38-39 (FAC ¶¶ 42, 45-47, 65, 106).

2. The affidavit submitted by FBI agents in support of the warrant consisted of only two sentences directly pertaining to why the government believed it would be impracticable to secure respondent's testimony by subpoena:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.

See J.A. 24 (FAC ¶ 49); *see also* J.A. 64 (affidavit). The government has since admitted that respondent actually had a round-trip ticket. Respondent also did not have a first-class ticket costing approximately $5,000, but rather a coach-class ticket costing less than $2,000. J.A. 16, 25 (FAC ¶¶ 14, 53).

The affidavit also failed to inform the magistrate judge that:

- respondent had voluntarily talked with the FBI on several occasions prior to his arrest and had never failed to show up to these pre-arranged meetings;

- respondent was a native-born citizen with significant ties to the United States and Idaho;

- prior to his arrest, respondent had not been contacted by the FBI for approximately six months;

- the FBI had never told respondent that he might be needed as a witness, that he could not travel abroad or even that he should inform the FBI if he did intend to travel abroad; and,

- respondent was never asked if he would be willing to testify, to voluntarily relinquish his passport or to otherwise postpone his trip to Saudi Arabia.

J.A. 16-17, 25-26 (FAC ¶¶ 15, 54).

The affidavit also did not claim that the government had attempted to locate respondent prior to seeking the arrest warrant or that respondent had been uncooperative. Notably, another witness in the Al-Hussayen case was permitted simply to relinquish his passport and postpone his trip to Saudi Arabia. J.A. 26-27 (FAC ¶¶ 54(f), 57).

In addition, although the affidavit stated that respondent's testimony was "crucial," it never explained what specific information respondent

possessed that was germane to the charges against Al-Hussayen. The affidavit contained largely irrelevant information and statements attempting to cast respondent in a suspicious light. J.A. 27-28 (FAC ¶ 58). Among other things, the affidavit stated that respondent had received payments from Al-Hussayen and Al-Hussayen's associates. In fact, the FBI agents requesting the warrant knew, or reasonably should have known, that respondent had worked for the same charitable organization as Al-Hussayen and had received a salary for his work. J.A. 28 (FAC ¶ 60).

3. The FBI agents who arrested respondent at the airport did not provide him with a copy of the warrant indicating that he was being detained as a witness, nor did they provide him with *Miranda* warnings or counsel. Instead, they handcuffed him and walked him through the airport in front of staring onlookers. J.A. 29-30 (FAC ¶¶ 66-67). They then interrogated respondent (without counsel) at an airport police station for 1-2 hours on a variety of topics, including his *own* religious beliefs, conversion to Islam and past travels. J.A. 30 (FAC ¶ 68).

The next day, respondent was brought before a magistrate judge in Virginia, but was not appointed counsel. Respondent explained that he had always cooperated with the FBI, would continue to cooperate and did not understand why the FBI had arrested him given his prior cooperation. The magistrate judge stated that although respondent was entitled to a release hearing in Virginia, he might be better

served going to Idaho for the hearing, at which point the government attorney assured respondent that he would be brought to Idaho as quickly as possible. Acting without counsel, respondent followed the magistrate judge's suggestion and agreed to have the hearing in Idaho. J.A. 32-33 (FAC ¶¶ 77, 78).

Respondent spent the next fifteen nights in jails in Virginia, Oklahoma and Idaho, where he was placed in high-security wings with convicted criminals, strip-searched and routinely shackled. J.A. 31, 33-35 (FAC ¶¶ 71, 83-87, 92-93). Respondent was eventually released from detention, but was required to live with his in-laws, report regularly to the government and remain within a four-state area. The government never called respondent as a witness at the trial (which did not commence for more than a year after his arrest). J.A. 38-39 (FAC ¶¶ 103-06). Even after trial, the government never moved to vacate the conditions of his supervision, forcing respondent to file a motion with the court in Idaho. J.A. 14, 38-39 (FAC ¶¶ 9, 103, 106-07).

4. As alleged in the complaint, respondent's arrest was part of a pattern of material witness arrests that occurred after September 11 pursuant to a nationwide policy instituted by petitioner. That policy used the material witness statute to detain and investigate suspects for whom the government lacked probable cause of wrongdoing, and not to secure testimony. J.A. 39-50 (FAC ¶¶ 109-41).

Only days after respondent's arrest, while he remained in detention, FBI Director Robert Mueller testified before Congress about the government's anti-terrorism efforts:

> I am pleased to report that our efforts have yielded major successes over the past 17 months. Over 212 suspected terrorists have been charged with crimes, 108 of whom have been convicted to date. Some are well-known – including Zacarias Moussaoui, John Walker Lindh and Richard Reid. But, let me give you just a few recent examples:
>
> . . . Khalid Shaikh Mohammed was located by Pakistani officials and is in custody of the US at an undisclosed location. Mr. Mohammed was a key planner and the mastermind of the September 11th attack. . . .
>
> . . . Abdullah al-Kidd, a US native and former University of Idaho football player, was arrested by the FBI at Dulles International Airport en route to Saudi Arabia. The FBI arrested three other men in the Idaho probe in recent weeks. And the FBI is examining links between the Idaho men and purported charities and individuals in six other jurisdictions across the country.

See Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies, Appropriations for 2004: Hearing Before a Subcomm. of the Comm. on Appropriations, 108th Cong. 91 (2003) (testimony of Robert S. Mueller, III, Director, FBI), http://www2.fbi.gov/congress/congress03/mueller032703.htm; J.A. 37 (FAC ¶ 100).

If the government had viewed respondent as a genuine witness, it is hard to imagine that his arrest would have generated so much attention so quickly within the highest ranks of the Justice Department, to the point where it was mentioned in congressional testimony only a few days after his arrest – and listed directly after the capture of the man who allegedly orchestrated the September 11 attacks.

Indeed, had the Justice Department actually viewed respondent as a witness, it is implausible that the FBI Director would even have *mentioned* respondent's arrest, much less cited it as one of the government's most noteworthy successes in combating terrorism since the September 11 attacks. And if respondent were indeed a genuine witness, the Director would presumably have mentioned that respondent was arrested on a material witness warrant, yet that central fact was entirely omitted from the Director's testimony.

Nor is Director Mueller's testimony the only evidence that respondent's arrest was part of a nationwide policy of using the material witness statute to arrest suspects. Petitioner himself, as well as numerous other high-ranking officials, routinely

made statements about how the material witness statute would be used to detain and investigate *suspects*.

In October 2001, for example, petitioner commented that the "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks" and that this policy would "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street[.]" J.A. 41 (FAC ¶ 117); *see also* J.A. 41 (FAC ¶ 116) (alleging that petitioner developed a policy in which the "FBI and DOJ would use the material witness statute to arrest and detain terrorism *suspects*").

Similarly, Michael Chertoff, the head of DOJ's Criminal Division in the years immediately following September 11, 2001, publicly highlighted the government's use of the material witness statute, saying, "It's an important *investigative* tool in the war on terrorism. . . . Bear in mind that you get not only testimony – you get fingerprints, you get hair samples – so there's all kinds of *evidence* you can get from a witness." J.A. 42-43 (FAC ¶ 121) (first emphasis added). In June 2003, David Nahmias, Counsel to the Assistant Attorney General, offered the Senate Judiciary Committee an example of how DOJ used the material witness statute in a case involving an "alleged terrorist": "[W]e got enough information to at least make him a material witness

and then to charge him criminally." J.A. 43-44 (FAC ¶ 124) (emphasis added).

Mary Jo White, the U.S. Attorney for the Southern District of New York in the years immediately preceding and following September 11, 2001, summed up the policy: "Some of the criticism that has been leveled at [DOJ for its post-9/11 use of the material witness statute] is not wholly unjustified. . . . Does it really sort out to being in one sense preventative detention? Yes, it does, but with safeguards." J.A. 42 (FAC ¶ 120).

As importantly, the circumstances surrounding the arrest and detention of these supposed witnesses underscore that those arrested were actually considered suspects, and not genuine witnesses. Like respondent, many of these "material witnesses" – by one account nearly 50 percent – were never called to testify. J.A. 45 (FAC ¶ 128). The government also refused to grant many post-9/11 material witnesses immunity for their testimony, although that traditionally has been a standard procedure for eliciting testimony from a witness. *Id.*

Once arrested, these material witnesses, including respondent, were routinely held in high-security conditions. J.A. 45-46 (FAC ¶¶ 129-30). Moreover, by DOJ's own estimates, the government detained about half of the witnesses it arrested in terrorism investigations for more than thirty days, an astounding length of time given that the statute itself directs the government to take depositions of witnesses so that innocent individuals are not

detained for unreasonably long periods. J.A. 47 (FAC ¶ 133). And even after being released from detention, many material witnesses were subjected to restrictive release conditions – and yet still were never called to testify, as was the case with respondent. J.A. 47 (FAC ¶ 134).

Exacerbating all of these abuses was the Justice Department's attempt to shield from public view the circumstances surrounding its use of the material witness statute. Records of material witness proceedings were routinely sealed, and the government kept secret the most basic information about its witnesses even in the face of direct congressional inquiry. J.A. 48 (FAC ¶ 135). *See* Br. of *Amicus Curiae* Human Rights Watch (detailing the material witness arrests after September 11); J.A. 44-48 (FAC ¶¶ 125-36).

B. Decisions Below.

The district court concluded that petitioner was not entitled to absolute or qualified immunity, J.A. 90-116, and the court of appeals affirmed that ruling in relevant part. Pet. App. 1a-105a. The court of appeals denied absolute immunity on the ground that petitioner's material witness policy was investigative, not prosecutorial, under this Court's functional test. Pet. App. 14a-27a (citing, *e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)). The court also held that petitioner was not entitled to qualified immunity if he used the material witness statute as a cover to detain and investigate suspects without probable cause to believe that they had

committed a crime. As the court of appeals explained, the government lacks the

> power to arrest and detain or restrict American citizens for months on end, in sometimes primitive conditions, not because there is evidence that they have committed a crime, but merely because the government wishes to investigate them for possible wrongdoing, or to prevent them from having contact with others in the outside world.

Pet. App. 63a; *see generally id.* at 40a-47a.

Judge Bea dissented in relevant part, arguing that petitioner was entitled to either absolute or qualified immunity. Pet. App. 64a-105a. The Ninth Circuit denied en banc review, with both concurring and dissenting opinions. Pet. App. 106a-132a.

SUMMARY OF ARGUMENT

1. Petitioner is not entitled to qualified immunity for misusing the material witness statute to detain and investigate suspects, rather than to secure testimony. A full-scale arrest is generally constitutional under the Fourth Amendment only if it is supported by probable cause to believe that a crime has been committed. The material witness statute represents a narrow exception to that general rule and constitutionally can be justified only if it is limited to securing testimony. Contrary to petitioner's argument, therefore, a demonstrated

purpose to misuse the statute as a form of preventive detention is directly relevant to the Fourth Amendment analysis.

Petitioner errs in relying on *Whren v. United States*, 517 U.S. 806 (1996), for the proposition that even the purposeful misuse of the material witness statute as a form of preventive detention is beyond Fourth Amendment scrutiny. In fact, *Whren* itself expressly affirmed that "purpose" is relevant in Fourth Amendment cases where, as here, probable cause of wrongdoing is lacking. *Id.* at 811-12. Nor is petitioner correct that the court of appeals rendered the material witness statute unconstitutional as applied to respondent. Consistent with the Fourth Amendment, the statute itself authorizes arrests only for the limited purpose of securing testimony. It does not permit material witness arrests to detain and investigate suspects whom the government lacks probable cause to arrest for a crime.

Critically, moreover, respondent does not contend that the government violates the Fourth Amendment in the type of dual motive case hypothesized by petitioner, where the prosecutor may genuinely be seeking the testimony of a witness but also may view the witness as a suspect who someday may be indicted. Here, respondent contends that the government would not have arrested him *but for* its interest in him as a criminal suspect, as evidenced by his prior cooperation, Director Mueller's testimony and the many other allegations in the complaint.

Finally, a reasonable official acting in 2003 would have known that he could not use the material witness statute to detain and investigate suspects. Petitioner is thus not entitled to qualified immunity.

2. Under this Court's functional immunity test, *see Kalina v. Fletcher*, 522 U.S. 118 (1997), petitioner is also not entitled to the extraordinary protection of absolute immunity for three reasons. *First*, petitioner cannot meet his burden of demonstrating a common-law tradition of immunity for seeking a material witness warrant. *Second*, even if prosecutors were *generally* entitled to absolute immunity for seeking a material witness warrant, that protection is not available where the warrant is sought to investigate the witness himself, a classic police function that receives qualified, not absolute, immunity. *Third*, and most narrowly, because absolute immunity does not cover the submission of an affidavit, and because the FBI agents who submitted an affidavit in this case did so pursuant to petitioner's directive, petitioner is not entitled to absolute immunity for directing the FBI to take that action, even if the line prosecutors were entitled to absolute immunity for filing the legal motion accompanying the affidavit.

ARGUMENT

The government arrested and jailed respondent for fifteen nights, during which time he was strip-searched, routinely shackled and housed with hardened criminals. All of this occurred even

though there was no claim that respondent had violated any law (or was a threat to himself or others).

Petitioner contends that the government's interest in securing testimony is sufficiently important to justify jailing a U.S. citizen without any allegation that he engaged in wrongdoing or presented a threat. Yet, in direct contradiction, petitioner also takes the position that the government's purpose in locking up respondent is *entirely* irrelevant under both the Fourth Amendment and the statute itself. Petitioner thus contends that although the government's non-punitive interest in securing testimony provides the justification for arresting an innocent, cooperative and non-threatening citizen, respondent's arrest was lawful even if the sole purpose for the arrest was to preventively detain and investigate respondent. That is an untenable position.

This Court has never permitted the government to use a civil scheme or non-punitive justification for jailing people as a ruse to circumvent the constitutional protections afforded criminal suspects. The Court should not take that unprecedented step in this case.

I. PETITIONER IS NOT ENTITLED TO QUALIFIED IMMUNITY.

A. Petitioner's Policy Of Using The Material Witness Statute To Detain And Investigate Criminal Suspects Without Probable Cause Of Wrongdoing Violated The Fourth Amendment.

The "usual rule" governing arrests is well settled: an arrest requires not just probable cause, but probable cause "to believe that a *violation of law has occurred*." *Whren v. United States*, 517 U.S. 806, 811, 818 (1996) (emphasis added). *See Brinegar v. United States*, 338 U.S. 160, 175 (1949) ("The substance of all the definitions of probable cause is a reasonable ground for *belief of guilt*") (emphasis added) (internal quotation marks omitted).

In *Dunaway v. New York*, 442 U.S. 200 (1979), the Court confronted a challenge to this fundamental Fourth Amendment rule. There, the government acknowledged that it could not arrest someone for *prosecution* unless it had probable cause of a violation of the law, but argued that it should be permitted to make an arrest for the purpose of engaging in *further investigation* based on the lower standard of "reasonable suspicion." *Id.* at 207, 211.

The Court flatly rejected that proposition, stressing that "centuries of precedent" demonstrate that the Fourth Amendment was designed precisely to prevent the police from arresting and

investigating individuals based on mere suspicion, even if that suspicion might be deemed reasonable. *Id.* at 214, 216. As the Court noted: "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed arrests or investigatory detentions." *Id.* at 214-15 (internal quotation marks omitted).

The Court, of course, has been willing to permit some lesser showing of individualized suspicion to satisfy the Fourth Amendment where the seizure is relatively minimal, as in *Terry* stops. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 27 (1968) (requiring only reasonable suspicion to justify a brief investigatory stop and frisk); *Dunaway*, 442 U.S. at 209-10 (noting that *Terry* "departed from [the] traditional Fourth Amendment" rule because the seizure there was "so substantially less intrusive" than a full-scale arrest). But the Court has never – in the history of the Fourth Amendment – created an exception where the seizure involves a *full-scale custodial arrest*.

A full-scale material witness arrest does not come within the *Terry* exception for minimally intrusive seizures. Nor does the statute satisfy the usual Fourth Amendment rule governing arrests given that it permits full-scale arrests without probable cause to believe there has been a violation of the law.

This Court has never squarely addressed whether the material witness statute is consistent

with the Fourth Amendment. But, if the statute is constitutional, it can only be because the *purpose* of an arrest under the statute is to secure testimony, and not to investigate the witness himself. Otherwise, the statute would allow the government to circumvent *Dunaway* and the bedrock Fourth Amendment principle barring a full-scale arrest absent probable cause of wrongdoing. The purpose for which the statute is used is thus not only relevant, but an indispensable feature of its constitutionality.

1. Petitioner's Reliance On *Whren* Is Misplaced.

Petitioner contends that the principle set forth in *Whren* supports his position that governmental purpose is wholly irrelevant in the material witness context. But, in fact, *Whren* supports respondent's argument.

a. In *Whren*, 517 U.S. at 810, the defendant conceded that there was probable cause to believe that he had committed a traffic offense, but argued that the stop was a pretext for uncovering evidence of other crimes. The Court rejected the relevance of the police officer's subjective motivation, but in doing so specifically stated that its analysis applied to the "run-of-the-mine case." *Id.* at 819; *see also id.* at 813 ("Subjective intentions play no role in *ordinary*, probable-cause Fourth Amendment analysis.") (emphasis added).

The Court stressed that where there is probable cause that the law has been violated, and the police have thus satisfied the "traditional" probable cause standard for an arrest, a defendant cannot complain about the motivations that may have led the police to enforce the laws. *Id.* at 813, 819. Critically, however, the Court also stated that purpose *is* relevant in cases involving the absence of traditional Fourth Amendment probable cause.

The Court noted, for example, that an inventory search of an impounded car is permitted in the absence of probable cause that the vehicle contains evidence of a crime because the *purpose* of the search is, among other things, "to protect against false claims of loss or damage" – and not to seek incriminating evidence for prosecution. *Id.* at 811 & n.1. As a result, the Court noted that it has looked at the purpose behind inventory searches to ensure that they are not a "ruse" to "discover incriminating evidence." *Id.* at 811 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

The Court likewise noted that administrative searches are permitted without probable cause of a violation of the law because the purpose of the search is not to uncover evidence of a crime for prosecution, but to enforce a "regulatory" scheme. Consequently, the Court explained that, as with inventory searches, it has looked at the purpose behind an administrative search to ensure that it is not "a 'pretext' for obtaining evidence of . . . [a] violation of

. . . penal laws." *Id.* at 811 (quoting *New York v. Burger*, 482 U.S. 691, 716-17 n.27 (1987)).

As *Whren* stated in distinguishing the traffic stop at issue there from the inventory and administrative cases:

> [O]nly an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.

Id. at 811-12 (emphasis in original).

Whren thus makes clear that the government cannot claim that it is exempt from the traditional probable cause requirement based on the *purpose* of the arrest, while simultaneously arguing that its reasons for making the arrest are irrelevant. If material witness arrests are constitutional, it is only because the purpose of such arrests is not to discover

incriminating evidence about the witness, but to secure his testimony. Thus, as with inventory and administrative searches, the "exemption" from the traditional probable cause standard is based specifically on the premise that the government is not seeking to investigate or prosecute the person subject to the search or seizure. And because the constitutionality of a material witness arrest is based on that premise, the government cannot claim that purpose is irrelevant.

In short, *Whren* and this case are entirely different. In *Whren*, the government satisfied the traditional probable cause standard, and the Court held only that the officer's subjective motivations would not invalidate a stop that otherwise satisfied the Fourth Amendment. Here, in contrast, a material witness arrest does not satisfy the Fourth Amendment unless the objective components of the statute are satisfied *and* the purpose of the arrest is valid. Thus, in the material witness context, the purpose underlying the arrest is not being used to invalidate an otherwise constitutional arrest based on probable cause of wrongdoing, but rather, is a necessary part of the initial inquiry into whether the arrest is constitutional in the first place.

b. Since *Whren*, moreover, the Court has reaffirmed, in a variety of Fourth Amendment contexts, that purpose is relevant where the government undertakes a seizure in the absence of traditional probable cause. The common thread in these cases is that the Court has excused the

government from the traditional probable cause requirement because the *purpose* of the seizure was not to detain the individuals for prosecution, but rather to pursue some distinct non-punitive objective. Accordingly, in these cases the Court has made clear that the government cannot seek an exemption from the traditional probable cause standard based on the purpose of the seizure, but then simultaneously insist that the purpose of the seizure is irrelevant.

A comparison of the Court's decisions in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Illinois v. Lidster*, 540 U.S. 419 (2004), is illustrative. In *Edmond*, 531 U.S. at 41-42, the Court invalidated a drug roadblock in which police stopped vehicles without probable cause to believe the driver had committed a violation of the law. The Court noted that because the roadblock's "primary purpose was to detect evidence of ordinary criminal wrongdoing," the City was not entitled to an exemption from the traditional probable cause requirement: "[W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control." *Id.* at 44.

In contrast, in *Lidster*, the Court upheld a roadblock whose basic objective features were indistinguishable from the one it had invalidated in *Edmond*. The difference was the purpose of the two roadblocks. The goal of the *Lidster* roadblock was to determine whether drivers had information about a hit-and-run accident that had occurred the prior

week on the same road, 540 U.S. at 422, while the purpose of the *Edmond* roadblock was to find incriminating evidence about the drivers themselves. 531 U.S. at 35. As the *Lidster* Court stated about the roadblock in that case:

> The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

Lidster, 540 U.S. at 423 (emphasis in original). The *Lidster* Court noted that the *Edmond* stops, in contrast, were "justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that *any given motorist has committed some crime.*" *Id.* (quoting *Edmond*, 531 U.S. at 44) (emphasis added in *Lidster*).

The same basic principle has also guided the Court in numerous other cases, both before and after *Whren*. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001) (invalidating a public hospital's program of drug testing pregnant women without probable cause that any particular woman was using drugs, because the hospital was working in conjunction with the police "to generate evidence *for*

law enforcement purposes" against the mothers); *id.* at 88 (Kennedy, J., concurring in the judgment) (explaining that the Court has relaxed the ordinary probable cause rule only on the "explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes" – *i.e.*, for investigation and possible prosecution); *Michigan v. Clifford*, 464 U.S. 287, 297-98 (1984) (plurality opinion) (allowing search of home destroyed by fire with an administrative warrant for the purpose of determining the fire's cause, but requiring a criminal warrant based on traditional probable cause if the purpose of the search is to gather "evidence of the crime of arson"); *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523, 535-38 (1967) (permitting administrative housing inspections without traditional probable cause because the purpose of the searches was to enforce a regulatory scheme, and not to obtain evidence for possible prosecution). *Cf. Kansas v. Hendricks*, 521 U.S. 346 (1997) (rejecting due process, *ex post facto* and double jeopardy challenges to civil confinement law, noting that the statute's purpose was non-punitive); *id.* at 371-73 (Kennedy, J., concurring) (stressing that "[i]f the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish").

Here also, the government cannot employ a statute designed to secure testimony as a pretext to

investigate and potentially prosecute witnesses. For decades, this Court has finely calibrated the constitutional rights of criminal suspects, including the Fourth Amendment right not to be arrested absent probable cause of wrongdoing. The government should not be permitted to evade this longstanding constitutional jurisprudence through the misuse of a statute designed for a wholly different and limited purpose. And, tellingly, the only two circuits that have addressed petitioner's material witness policy have concluded that "it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established." *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003); Pet. App. 1a, 40a (Ninth Circuit decision in this case).

2. The Statute Itself Precludes Its Use To Investigate Suspects.

Petitioner erroneously contends that purpose is not only irrelevant under the Fourth Amendment, but also under the statute. According to petitioner, a material witness arrest does not violate the statute as long as the government satisfies the objective criteria of materiality and impracticability – even if the government's sole purpose is to detain and investigate the witness. Petitioner thus maintains that the court of appeals rendered the statute unconstitutional as applied to cases where these objective criteria are satisfied. Pet. Br. 35-38.

Petitioner's statutory analysis, like his Fourth Amendment analysis, does not confront the implications of his position. If petitioner's categorical position were correct, then the government could have submitted a warrant application in respondent's case that included all of the same objective facts regarding materiality and impracticability, but also candidly informed the magistrate judge that the government (i) had no intention of using respondent's testimony in a criminal proceeding, (ii) lacked probable cause to believe that respondent had violated the law and (iii) nonetheless wished to arrest and detain respondent for the sole purpose of investigating him for possible criminal wrongdoing. That is an implausible reading of the statute and an untenable Fourth Amendment position. Yet it is the logical extension of petitioner's argument.

Indeed, the implications of petitioner's position go beyond the *Bivens* claim in this case. If purpose were wholly irrelevant, then an injunctive action on behalf of a still-detained witness would necessarily fail as long as there had been a showing of materiality and impracticability – even if there were clear proof that the government was not seeking the witness's testimony and had arrested him solely for purposes of interrogation. That would mean that supposed witnesses could remain in detention for weeks, or even months, pending the outcome of the government's investigation – and, indeed, that is precisely what occurred under

petitioner's policy throughout the country. *See* J.A. 47 (FAC ¶ 133).

The statute and Fourth Amendment are entirely consistent in this regard: both prohibit the government from arresting an innocent witness for the purpose of investigating the witness himself, rather than securing his testimony. The original 1789 statute, enacted contemporaneously with the Fourth Amendment, could be used solely for securing testimony from a non-cooperative witness. And there is absolutely no evidence to suggest that Congress's subsequent amendments to the statute were meant to transform it into a preventive detention and investigation tool.

a. The settled rule for hundreds of years in both England and colonial America was that a cooperative witness could not be jailed. *See, e.g.*, Marian Statutes, 1 & 2 Phil. & Mar. ch. 13 (1554); 2 & 3 Phil. & Mar. ch. 10 (1555). The first federal material witness statute in the United States was enacted as part of the First Judiciary Act of 1789. *See* First Judiciary Act, ch. 20, § 33, 1 Stat. 73, 91 (1789). Like the material witness laws that existed in England and during the colonial period, the 1789 provision was exceedingly limited and authorized imprisonment *only* where a witness refused to promise to testify – to give "recognizance."

The 1789 statute thus functioned like a civil contempt statute. Unlike the current federal statute, it did not permit a witness to be jailed based solely on an *ex parte* determination that it might become

impracticable to secure his presence at trial. Rather, the 1789 statute simply provided that a witness could be ordered to promise to appear and testify. As long as he agreed to do so, he could not be detained; in fact, the statute did not even authorize the magistrate to require a bond or surety from the witness. 1 Stat. at 91.

And because a witness could not be jailed unless he literally refused to promise to testify, the statute could not be used in the pretextual manner alleged here. The very operation of the statute precluded its use as a mechanism for investigative detention – the witness could avoid jail simply by agreeing to testify.

b. Congress subsequently revised the material witness statute (and also enacted companion laws) on several occasions before passage of the current statute in 1984. But none of the revisions reveal *any* indication that Congress intended to turn the law into a detention and investigation tool.

Among other things, Congress expanded the laws to cover certain territories (*e.g.*, Alaska) and to address specific subject-matter areas (such as the availability of witnesses in admiralty cases). As with the original 1789 statute, these laws provided only limited authority to jail witnesses, with the focus continuing to be on ensuring that uncooperative witnesses – those who affirmatively refused even to promise to testify – could be jailed. *See, e.g.*, Act of Apr. 4, 1800, ch. 19, §§ 14-15, 2 Stat. 19, 25-26 (bankruptcy); Act of Aug. 23, 1842, ch. 188, § 2, 5

Stat. 516, 517 (admiralty cases); Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 72, 73-74; Act of Mar. 2, 1867, ch. 176, § 26, 14 Stat. 517, 529 (bankruptcy); 1 Rev. Stat. 166-67 §§ 878-79, 881 (1878) (non-substantive codification of existing laws); Edmunds-Tucker Act, ch. 397, § 2, 24 Stat. 635, 635 (1887) (polygamy, bigamy and other cohabitation offenses); Alaska Criminal Code, ch. 429, §§ 326-29, 30 Stat. 1253, 1321 (1899) (Alaska); 28 U.S.C. §§ 656-57, 659-60 (1925) (corresponds to Act effective Dec. 7, 1925, ch. 17, §§ 656-57, 659-60, 44 Stat. xiii, cmxlii) (non-substantive organization of existing laws into the U.S. code); Act of June 17, 1935, ch. 266, § 802, 49 Stat. 385, 385 (District of Columbia); Bail Reform Act of 1966, Pub. L. No. 89-465, sec. 3(a), 80 Stat. 214, 216 (codified at 18 U.S.C. § 3149) (repealed 1984).[1]

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[1] Citing *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929), and *New York v. O'Neill*, 359 U.S. 1 (1959), petitioner contends that the Court has assumed the constitutionality of prior federal and state statutes. Pet. Br. 36-37. But the statutes at issue in those cases were far more limited than the current statute. *See Barry*, 279 U.S. at 617 (discussing, in dicta, former 28 U.S.C § 659 (1925), which did not permit a witness to be detained if he was willing to provide a recognizance, and even required that the witness be "necessary" to the proceeding).

In *O'Neill*, 359 U.S 1, the Court rejected a challenge to a Florida statute allowing for compulsory process against witnesses located in Florida who were needed to testify in other states, because the Court assumed that "Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State." *Id.* at 7. Notably, Florida's material witness statute at the time

c. The current version of the statute, 18 U.S.C. 3144, likewise reveals no indication that Congress intended to alter course after 200 years and to allow the statute to be used for the purpose of arresting and investigating suspects. The statute's text provides that a warrant may issue only where "the testimony of a person is material *in a criminal proceeding*" and it may become "impracticable to secure *the presence of the person* by subpoena" in that criminal proceeding. 18 U.S.C. 3144 (emphasis added). These textual requirements belie petitioner's contention that the government need not intend actually to secure testimony for a criminal proceeding and can simply be seeking to investigate the witness himself.

Indeed, if petitioner's reading of the materiality and impracticability requirements were correct, then the government could inform a magistrate judge, under oath, that it believed it

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permitted the imprisonment of a witness only for refusal or inability to provide a recognizance and/or security for his appearance. And if the witness was unable to provide a security, the statute required that he be detained no more than three days to allow for his conditional examination. *See* Fl Comp. Gen. Laws §§ 8663(39)-(41) (Supp. 1940). The same is true of Florida's statute today *See* Fl. Stat. Ann. §§ 902.15, 902.17. In fact, by respondent's count, at least 30 of the state material witness statutes currently in force require some form of non-compliance by the witness before detention is authorized. *See, e.g.*, Ill Comp. Stat. Ann. ch. 725, § 5/109-3; Mass Gen. Laws Ann ch. 276, §§ 45-52. *See also* Charles Doyle, CRS REPORT FOR CONGRESS. ARREST AND DETENTION OF MATERIAL WITNESSES 15 (2005) (listing all state statutes).

would be impracticable to secure the witness's "presence" at the proceeding – even if the government had no intention to call the witness at any such proceeding. That is not a commonsense interpretation of the statute's materiality and impracticability requirements.

Petitioner's reading of the materiality and impracticability requirements would also undermine the integrity of the warrant application proceedings. In ordering the arrest of an innocent person pursuant to the statute, magistrate judges plainly assume, and should have the right to assume, that they are doing so only because the government genuinely believes it may need the testimony.

The statute's emphasis on taking depositions to ensure a witness's prompt release reinforces that its purpose is to secure testimony, and not to investigate suspects. 18 U.S.C. 3144 (a witness may not "be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice"); *ibid.* (stating that release "may be delayed for a reasonable period of time *until the deposition of the witness can be taken*") (emphasis added). Like the provision's other textual requirements, the deposition requirements would make little sense if Congress intended for the statute to be used as a tool for preventive detention and investigation. *See Holloway v. United States*, 526 U.S. 1, 9 (1999) (interpreting a provision's text in

light of Congress's overall "purpose" and the objectives of the "statute as a whole"). *See also* S. Rep. 98-225, at 28 n.90, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 (noting that "[o]f course a material witness is not to be detained on the basis of dangerousness").

In sum, Congress has been consistent throughout the past two centuries. In the tradition of English and colonial laws, the 1789 statute was not intended for anything other than securing testimony. Subsequent amendments did not alter that critical limitation.

3. Petitioner Violated The Fourth Amendment If Respondent Would Not Have Been Arrested *But For* The Government's Interest In Preventively Detaining And Investigating Him As A Suspect.

a. Petitioner argues that an investigatory purpose is not necessarily illegitimate because prosecutors will often genuinely want the witness's testimony and believe it cannot be secured absent a material witness warrant, but also may view the witness as a suspect and may therefore not have ruled out the possibility that the witness will someday be charged with a crime if evidence of wrongdoing emerges. But this case does not present the type of dual motive arrest hypothesized by petitioner, and respondent does not contend that the prosecutor in that scenario would violate either the Fourth Amendment or the statute.

Respondent's position is that the Fourth Amendment and statute are violated where the government would not have sought the warrant *but for* its interest in detaining and investigating the witness himself. And respondent's allegations are consistent with that legal position. *See, e.g.*, J.A. 40 (FAC ¶ 112) ("Defendants' purpose in arresting and detaining Mr. al-Kidd was not to secure his testimony, but to preventively hold and investigate him for possible criminal wrongdoing"); J.A. 52 (FAC ¶ 154) (Mr. al-Kidd "was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony was needed").

The touchstone, under both the statute and the Constitution, is whether the government's interest in the testimony would have prompted it to seek the warrant, regardless of any interest the government may have had in detaining and investigating the witness. If that is the case, then the investigative interest was not a *but for* cause and no liability would attach. *Cf. Hartman v. Moore*, 547 U.S. 250, 256 (2006) (applying *but for* test in case alleging that postal inspectors unlawfully induced prosecutor to pursue criminal charges in retaliation for protected speech, stating that respondent could prevail only if the prosecution would not have been brought absent the illegitimate motives).

This basic requirement ensures that the government is not abusing the integrity of the criminal process by misusing the statute to detain

and investigate a suspect absent probable cause to charge the suspect with a crime. Of course, the government may ultimately choose, for a variety of legitimate reasons, not to call a material witness at trial. Similarly, the government may ultimately choose to indict someone whom it initially and legitimately arrested as a witness. But both of those scenarios are very different from the situation alleged here, where respondent contends that he would not have been arrested in the first place but for the FBI's interest in detaining and investigating him.

b. Given this "but for" standard, and the small number of material witness arrests each year, petitioner's contention that there will be an avalanche of suits is overblown. Pet. Br. 24-27. In support of that contention, petitioner's *amici* observe that there were approximately 4,000 material witness hearings annually between 2002 and 2004. Br. of *Amici Curiae* William P. Barr *et al.* 25 n.11. But *amici* fail to note that material witness arrests occur overwhelmingly in immigration cases, where the non-citizen is *already* subject to custody and the material witness warrant is sought only for the purpose of delaying deportation to allow the non-citizen to testify against his smuggler. In 2003, for instance, the year of respondent's arrest, approximately 92 percent of all material witness arrests were in immigration cases. *See* Pet. App. 32a n.16 (citing Justice Department statistics).

There are thus only a few hundred cases in the entire country each year in which a suit could even be imaginable (*i.e.*, non-immigration cases where the government did not already have custody over the individual). And of these few hundred, the actual number of potentially viable cases is minuscule in light of the hurdle presented by respondent's proposed standard of liability, as well as basic pleading requirements.

Under respondent's proposed standard, a prosecutor could be sued only if the witness could plausibly allege that his arrest would not have been sought *but for* the prosecutor's interest in preventively detaining and investigating him as a suspect. Given that burden, prosecutors would be forced to defend their actions only in the most egregious cases, where it could be plausibly alleged that they deliberately chose to use the statute as an investigative tool.

Indeed, the very cases cited by petitioner show that it will not be easy to plead this standard and subject prosecutors to burdensome discovery. *See* Pet. Br. 17-18. As these cases show, a material witness arrest will ordinarily be one where the purpose is clearly to secure testimony. *See, e.g.*, *Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984) (noting that prosecutor's "main witness" failed to appear on day of trial); *Daniels v. Kieser*, 586 F.2d 64, 66, 69 (7th Cir. 1978) (warrant issued after trial had commenced; noting that prosecutor "was attempting to secure Daniels's presence at the

resumption of trial" and that Daniels "subsequently testified"). The witnesses in *Betts* and *Daniels* would not have been able to plausibly allege that their arrests were for investigative purposes – much less prove that their arrests would not have occurred but for the government's interest in preventively detaining and investigating them.

Nor should it be surprising that few witnesses would ever be able to plead the requisite allegations. Notwithstanding petitioner's attempt to portray this case as involving a straightforward and conventional use of the statute, the allegation here is that petitioner and the Justice Department deliberately and systematically used the statute for reasons other than securing testimony, and did so with respect to an individual who, among other things, had cooperated previously, had never been told he might be needed as a witness and had never been told to advise the government if he intended to travel. Effectively, the government is seeking permission to transform the statute into a preventive detention and investigation law.

c. *Amici* Barr *et al.* contend that the material witness statute is a critical tool in fighting terrorism and observe that a few "high-profile convicted terrorists . . . initially were held on a temporary basis as material witnesses." Br. 25 n.10. Petitioner similarly notes that Terry Nichols was first arrested as a material witness. Pet. Br. 39. However, respondent's "but for" test would not have precluded the use of the material witness statute in those cases

as long as the prosecutors genuinely were seeking testimony, even if the prosecutors *also* viewed the witnesses as suspects who might eventually be indicted.

Insofar as petitioner and his *amici* are arguing that those material witness arrests should be deemed lawful simply because they led to criminal convictions, that position is extraordinary. Overwhelmingly, the "witnesses" held pursuant to petitioner's policy were not charged with a crime, much less convicted, and many (like respondent) were not even called to testify, all underscoring the dangerous nature of a preventive detention and investigation scheme. *See* Br. of *Amicus Curiae* Human Rights Watch.

More fundamentally, the material witness statute was not enacted as a tool for preventive detention and investigation, and the Justice Department may not *unilaterally* turn it into one. *See* Br. of *Amicus Curiae* The Constitution Project (noting that Congress declined to pass a preventive detention statute after September 11 despite the Justice Department's insistence that such a statute was necessary).

4. Courts Are Not Precluded From Ensuring That The Statute Is Used Properly.

Petitioner alternatively contends that even if purpose is relevant, the courts still may not examine the purpose for which a material witness arrest was

made. Petitioner, however, has not cited a single decision where this Court concluded that the legality of an arrest or detention depended on its use for a particular purpose, but nonetheless held that the courts were precluded from ensuring that the government acted pursuant to that legally required purpose.

a. Petitioner argues that because material witness arrests are made pursuant to warrants, there is no need for a check on the statute's abuse. Pet. Br. 33-35. But this Court long ago made clear that a warrant procedure does not insulate improper Fourth Amendment activity from scrutiny. In *Malley v. Briggs*, 475 U.S. 335, 344 n.7, 346 n.9 (1986), the Court held that a police officer could be sued for damages if he submitted a facially insufficient affidavit in support of an arrest warrant, and specifically rejected the argument that the magistrate judge's decision to issue the warrant insulated the police officer's Fourth Amendment violation.

Likewise, in *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held that police officers violate the Fourth Amendment where they intentionally or recklessly submit an affidavit in support of a search warrant that contains materially false statements. In doing so, the Court observed that because a hearing before a magistrate judge will be *ex parte*, it will "not always . . . suffice to discourage lawless or reckless misconduct." *Id.* at 169. The Court stressed that it is difficult for magistrate judges to uncover

omissions and hidden agendas because they cannot "make an extended independent examination of the affiant or other witnesses." *Ibid.*

Here, to provide any meaningful check on conduct like petitioner's, the magistrate judge would not only have had to uncover the specific omissions and false statements in the affidavit submitted in this case, but also would have had to assess those omissions and false statements against the backdrop of a nationwide practice in which witnesses routinely were being held as suspects. No magistrate judge, in an *ex parte* hearing, could have been expected to uncover a nationwide policy directing DOJ officials to use the statute in a pretextual manner.

b. Petitioner also emphasizes that a material witness arrest may only be made where specific objective criteria are satisfied (*i.e.*, materiality and impracticability). Pet. Br. 33 (arguing that in roadblock cases, such as *Edmond*, the seizures lacked an "individualized basis"). But that does not distinguish this case from others in which the Court has examined purpose under the Fourth Amendment. *See, e.g.*, *Ferguson*, 532 U.S. at 71 n.4, 81-82 (examining purpose notwithstanding that those searched had to fall within one or more of nine specific criteria); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 609-11, 620-21 (1989) (examining purpose notwithstanding that railroad employees could be searched only if they were involved in certain types of train accidents or violated specific safety rules).

Furthermore, the statute's objective criteria – the materiality and impracticability requirements – do not meaningfully constrain the government from misusing the statute. As an initial matter, the statute's text does not even require a showing of probable cause to satisfy those objective requirements. *See* 18 U.S.C. 3144 ("If it *appears* from an affidavit . . . that the testimony . . . is material . . . and if it is *shown* that it may become impracticable to secure the presence of the person by subpoena . . . ."') (emphasis added). More fundamentally, satisfying the two objective criteria does not remotely eliminate the possibility that the warrant is being sought to detain and investigate the witness himself, rather than to secure his testimony.

In fact, according to petitioner, the very individuals most likely to satisfy the materiality and impracticability criteria – criminal suspects – are those whom the government is most likely to wish to detain and investigate. Pet. Br. 38 (arguing that a *suspect* will be especially likely to have material information about his alleged accomplices and to be a flight risk). Thus, under petitioner's own reasoning, the statute's objective requirements will be most easily met in precisely those cases where there is a danger that the statute is being misused as a tool to detain and investigate suspects whom the government lacks probable cause to arrest on criminal charges.

c. Finally, petitioner argues that the court of appeals erred in analogizing this case to *Edmond*,

531 U.S. 32, because that case involved an inquiry into purpose at a "programmatic" level, while this case involves a policy implementing a statutory scheme. Pet. Br. 35. As an initial matter, *Edmond* did not state that the Court would look at purpose only in the context of a "program," much less purport to provide an exhaustive catalogue of the ways in which an impermissible purpose can be detected. And the Court's Fourth Amendment cases have in fact examined purpose in a variety of contexts. *See, e.g.*, *O'Connor v. Ortega*, 480 U.S. 709, 727 (1987) (plurality opinion) (remanding to determine hospital officials' "actual justification" for conducting a search of an employee's office); *City of Ontario, California v. Quon*, 130 S. Ct. 2619, 2631 (2010) (holding that police chief's intent in searching an employee's text messages established a legitimate work-related rationale for the search); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (holding that respondent failed to show that individual officers conducting an inventory search had a pretextual motive); *Clifford*, 464 U.S. at 294 (plurality opinion) (fire investigators must meet different standards depending upon the purpose of the search).

In any event, petitioner is incorrect that this case is wholly unlike *Edmond*. In *Edmond*, 531 U.S. at 48, the Court stated that it would not examine the motivations of "individual officers acting at the scene," but did assess the purpose of the roadblock at a programmatic level. The Court's concern in *Edmond* about examining the motives of police officers making instantaneous, on-the-ground

decisions is not present here. Rather, the district court is being asked to determine the purpose of a systemic, deliberate policy, a task that courts routinely undertake. *See, e.g., id.* at 46-47 (examining purpose under Fourth Amendment, and noting that courts "routinely" examine purpose "in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful").

Petitioner argues, however, that only the statute itself, and not his policy, should be viewed as the "program." Petitioner thus contends that because the statute's purpose is to secure testimony, there is no constitutional infirmity. Pet. Br. 35. But petitioner cannot hide behind the statute's purpose while simultaneously adopting a policy that deliberately and systematically flouts the purpose of the statute.

Moreover, even if there had been no policy directing the FBI agents and line prosecutors to seek respondent's arrest for investigative reasons, respondent's arrest under the material witness statute would still have been unconstitutional if its purpose was preventive detention and investigation. Petitioner cites *Brigham City v. Stuart*, 547 U.S. 398 (2006), Pet. Br. 31-32, but that case involved a scenario far removed from the careful and deliberative decision to seek a warrant. In *Brigham City*, the Court upheld a home search in which the police had traditional probable cause but lacked a warrant. In excusing the absence of the warrant, the

Court stressed the exigencies faced by the police officers in the heat of the moment, including not only an occupant who appeared "injured" and in need of emergency aid, 547 U.S. at 406, but also "*ongoing* violence." *Id.* at 405-06 (emphasis in original). Under these circumstances, the Court refused to examine the "individual officer's state of mind" to discern whether the entry was made principally "to assist the injured and prevent further violence" or instead to make an arrest. *Id.* at 404, 405.

Thus, not only did *Brigham City* involve a longstanding exception to the warrant requirement for searches (as opposed to an exception to the traditional probable cause standard for full-scale arrests), but it is also precisely the type of case in which the Court would have had to uncover the motivations of individual officers making immediate decisions on the ground. The decision to seek a warrant is very different from the type of decision faced by the police in *Brigham City*. Seeking a warrant is a deliberative process, far removed as a practical matter from uncovering the motivations of an officer reacting immediately to unfolding events. The decision to implement a policy of seeking material witness warrants to detain and investigate criminal suspects without probable cause of wrongdoing is even further removed from the exigencies faced by an individual officer in the field.

* * *

The material witness statute is designed for a singular purpose – to secure testimony. As a matter

of both the Fourth Amendment and statutory construction, the government must therefore adhere to that purpose. Otherwise, the government could circumvent the traditional rule barring custodial investigative arrests in the absence of probable cause of wrongdoing.

B. Petitioner Is Not Entitled To Qualified Immunity.

No court to address petitioner's policy has concluded that it would be lawful to use the material witness statute as a tool for preventive detention and investigation. *See Awadallah*, 349 F.3d at 59; *United States v. Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002) ("Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute."), *rev'd on other grounds*, 349 F.3d 42 (2d Cir. 2003); Pet. App. 40a (Ninth Circuit opinion); J.A. 102, 111 (district court decision in this case).

Petitioner notes that only the district court decision in *Awadallah* was issued before respondent's arrest and that the decision in that case was overturned. Pet. Br. 41-42. Significantly, however, the Second Circuit did *not* disagree with the district court on the point relevant to this case. In fact, as previously noted, the Second Circuit in *Awadallah*, 349 F.3d at 59, expressly recognized that "it would be improper for the government to use § 3144 for other ends, such as the detention of

persons suspected of criminal activity for which probable cause has not yet been established."

In any event, respondent's qualified immunity argument is not based on the existence of pre-2003 case law directly addressing petitioner's policy. Rather, respondent's position is that a reasonable official would not have needed a court to tell him that he could not use the material witness statute for detaining and investigating suspects, rather than securing testimony.

Specifically, respondent's qualified immunity argument tracks the narrow scope of his position on the merits. As discussed above, respondent does not contend that the government violates the Fourth Amendment where there are dual motives for seeking the warrant, but only where a witness would not have been arrested *but for* the government's interest in detaining and investigating him. Thus, the precise immunity question in this case, properly defined, is the following:

> Would a reasonable official in 2003 have believed he could appear before a magistrate judge and present the al-Kidd warrant application but with two candid additions: (i) the government lacks probable cause to believe that al-Kidd has violated the law, but wishes to preventively detain and investigate him, and (ii) the government has no intention of using al-Kidd as a witness and would not be seeking a material

> witness warrant for al-Kidd but for its desire to detain and investigate him as a criminal suspect.

No official reasonably could have believed he could lawfully seek a warrant under those circumstances. Indeed, it would be unthinkable for any official – much less the Attorney General of the United States – to make those representations to a federal magistrate judge and believe he was acting constitutionally. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (noting that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

Petitioner's contention that he is entitled to qualified immunity is unresponsive to this precise question. Even if petitioner believed in 2003 that respondent's arrest was constitutional if undertaken with dual motives, he could not reasonably contend that the arrest would have been constitutional if the government would not have sought the warrant *but for* its interest in detaining and investigating respondent as a suspect.

II. PETITIONER IS NOT ENTITLED TO ABSOLUTE IMMUNITY.

Under the Court's functional test, *see Kalina v. Fletcher*, 522 U.S. 118 (1997), petitioner is not entitled to absolute immunity for several reasons. As an initial matter, there is no common-law tradition of immunity for seeking a material witness warrant. Moreover, even if prosecutors are generally

entitled to absolute immunity for seeking a material witness warrant, that protection is not available where the warrant is sought to investigate the witness. Finally, and most narrowly, because absolute immunity does not cover the submission of an affidavit to procure a warrant, and because the FBI agents who submitted an affidavit in this case did so pursuant to petitioner's directive, petitioner is not entitled to absolute immunity for his role in directing the actions of the FBI agents.

A. There Is No Common-Law Tradition Of Immunity For Procuring A Material Witness Warrant.

1. In assessing an official's claim to absolute immunity, the Court has stressed four points that are particularly relevant here. First, a "common-law tradition of absolute immunity" is a necessary (but not sufficient) requirement, and the official seeking such extraordinary protection bears the burden of demonstrating such a tradition. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *see also Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432-34 (1993).

Second, the official must show that there was a common-law tradition of immunity for the *precise* function at issue. *See Buckley*, 509 U.S. at 269 (burden is on official to identify a tradition of immunity for a "given function"); *Malley*, 475 U.S. at 339-40 (requiring official to "point to a common-law counterpart to the privilege he asserts").

Third, in the absence of common-law cases dealing specifically with prosecutors, the Court looks to other actors in the common-law criminal justice system to determine whether they enjoyed immunity for performing the same function. In particular, the Court has considered whether a common-law tradition of immunity existed for private parties, who until the 1800s performed many of the functions now assigned to public prosecutors and other officials. *See Malley*, 475 U.S. at 340-41 & n.3 (examining immunity given to a "complaining witness" for seeking an arrest warrant); *see also Burns v. Reed*, 500 U.S. 478, 504 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

Fourth, the official seeking absolute immunity cannot merely show an absence of cases holding an official liable for performing the function at issue, but rather must identify common-law decisions actually granting immunity. Thus, if there is no case-law at all – involving prosecutors or any other analogous common-law actors – then absolute immunity is unavailable. *See Antoine*, 508 U.S. at 434 (denying absolute immunity to court reporters for taking transcription because of an "absence of a common-law tradition involving court reporters themselves," and because "common-law judges," who did enjoy immunity, "performed [a] . . . significantly different" function); *see also Burns*, 500 U.S. at 492; *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985).

2. Petitioner has not satisfied his burden and, in fact, has presented no evidence of a common-law

tradition of immunity for procuring a material witness warrant. Pet. Br. 14-27; *see also* Pet. App. 17a (opinion below) (petitioner presented "no historical evidence").

Insofar as petitioner mentions the common law at all, it is only in his citations to *Imbler v. Pachtman*, 424 U.S. 409 (1976), where the Court concluded that prosecutors were historically entitled to immunity for the decision to initiate and pursue criminal charges, and held that such immunity covered the prosecutor's act of calling certain witnesses and eliciting false testimony from them at trial. Pet. Br. 14-16 (citing *Imbler*, 424 U.S. at 420-23, 431 n.33). But petitioner has failed to show that there was immunity for the specific function at issue here, which is not the discretion to decide which witnesses to call at trial, or the act of eliciting testimony from such witnesses in court, but the decision to seek a warrant for the *arrest* of an innocent witness – a function far removed from what was at issue in *Imbler*.

3. Even if petitioner had attempted to show a tradition of immunity for procuring a material witness warrant, he would not have been able to do so. The common law did not provide absolute immunity for procuring an arrest or search warrant, and certainly did not do so for one seeking a warrant to arrest an innocent and cooperative witness.

a. In *Malley*, 475 U.S. at 340-41 & n.3, the Court examined common-law history and held that one who seeks an *arrest* warrant is not entitled to

absolute immunity. Although *Malley* involved a police officer, the Court's historical analysis was not limited to police officers, *see id.* at 340 (concluding that "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable"); moreover, the "identity of the actor" is irrelevant under this Court's immunity jurisprudence. *Kalina*, 522 U.S. at 127; *Burns*, 500 U.S. at 506 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasizing that *Malley* must govern even where the "defendant is a prosecutor"). *Cf. Kalina*, 522 U.S. at 129 (reaffirming *Malley* but granting prosecutor absolute immunity with respect to arrest warrant sought *in conjunction with* the prosecutor's filing of the "information" and other "charging documents" to initiate the case, a function that triggers absolute immunity).

b. The Court has not squarely addressed whether one who seeks a *search* warrant is entitled to absolute immunity and specifically reserved that question in *Burns*. *See* 500 U.S. at 487, 489 (granting prosecutor absolute immunity for appearance at hearing, stating that "we address only [the prosecutor's] participation in the search warrant hearing" and not his "motivation in seeking the search warrant" in the first place).

But, as Justice Scalia has noted, there was in fact no absolute immunity "for procuring a search warrant" at common law. *Id.* at 504 (Scalia, J., concurring in the judgment in part and dissenting in

part) (citing cases). And, indeed, although *Malley* involved an arrest warrant, the Court pointedly stated that "the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant." 475 U.S. at 344 n.6; *see also id.* at 341 n.3.

c. Procuring a warrant for the arrest of a material witness was also not a function to which the common law extended absolute immunity. Respondent is not aware of a single pre-twentieth century case granting absolute immunity to someone sued for improperly procuring a material witness warrant. Indeed, there is evidence that private litigants and public officials could be sued for damages for wrongfully imprisoning a witness, although there are generally very few reported cases on point. *See Marsh v. Williams*, 1 How. (Miss.) 132 (1834).

The absence of cases is not surprising. Generally, state and federal witnesses during that period could be imprisoned only after they had disobeyed a summons or subpoena or affirmatively refused to give their "recognizance," or promise to appear and testify. *See supra* Section I.A.2 (discussing federal statutes); *see also Comfort v. Kittle*, 81 Iowa 179 (1890) (granting habeas because court lacked authority to require witness to furnish sureties in addition to his recognizance); *Bickley v. Commonwealth*, 2 J.J. Marsh. 572, 1829 WL 1449 (Ky. App. 1829) (setting aside order of commitment

for same reason); *United States v. Caldwell*, 25 F. Cas. 238, 238 (C.C.D. Penn. 1795) (attachment may issue against witnesses "only [if] . . . the subpoena has been actually served" and disobeyed). As a result, there was far less likelihood of a witness suing.

Thus, in the 1800s, Congress and state legislatures would not even have recognized the modern federal statutory scheme, where a cooperative witness can be arrested and detained based solely on an *ex parte* showing that it may become "impracticable" to secure the witness's testimony by subpoena. They certainly would not have assumed that there would be *complete immunity* for improperly seeking the arrest of an innocent, cooperative witness.

And notably, at the turn of the twentieth century, when there were a few more suits against private parties for procuring the improper arrest of witnesses, the courts still did *not* grant absolute immunity. *See Bates v. Kitchel*, 160 Mich. 402 (1910) (holding that a witness who was wrongfully imprisoned for failing to give a recognizance could sue the criminal defendant who sought his testimony); *Bates v. Kitchel*, 166 Mich. 695 (1911) (affirming award of damages to the plaintiff); *Lovick v. Atl. Coast Line R.R.*, 129 N.C. 427 (1901) (holding that railroad company was liable for its role in procuring the unlawful arrest of a witness).

In sum, there is no evidence of a tradition of immunity for procuring a material witness warrant

(or a search or arrest warrant). But even if the Court deemed the historical record silent or ambiguous on the question, absolute immunity must be denied because petitioner has failed to carry his burden.

B. Prosecutors Are Not Entitled To Absolute Immunity For Using The Statute To Investigate Suspects.

Even assuming *arguendo* that line prosecutors generally should be afforded absolute immunity for seeking a material witness warrant, they are not entitled to such protection where they deliberately use the statute to detain and investigate suspects. And because a line prosecutor would not be entitled to absolute immunity for using the statute for investigative purposes, petitioner also should not be entitled to such protection for his policy directing prosecutors to use the statute in that manner.

1. "[O]ne of the unquestioned goals" of the Court's immunity cases is "ensuring parity in treatment among state actors engaged in identical functions." *Buckley*, 509 U.S. at 288 (Kennedy, J., concurring in part and dissenting in part); *see Forrester v. White*, 484 U.S. 219, 229 (1988); *Burns*, 500 U.S. at 494-95. Thus, because police officers do not receive absolute immunity when performing investigative functions, prosecutors are likewise not entitled to absolute immunity where they engage in such activities. *See Buckley*, 509 U.S. at 274 (prosecutor's participation in investigative witness interviews and the fabrication of evidence); *Burns*, 500 U.S. at 482, 496 (prosecutor's advice to police

regarding the legality of questioning and arrest); *Mitchell*, 472 U.S. at 520-24 (Attorney General's investigative wiretaps).

Here, respondent alleges that the purpose of his arrest was to investigate him. Petitioner does not dispute the plausibility of that allegation. Nor does petitioner dispute that investigating a suspect to determine whether there is probable cause to charge him with a crime is a traditional police-type function for which absolute immunity is unwarranted. *Buckley*, 509 U.S at 273 (absolute immunity is unavailable where prosecutor is seeking "probable cause to recommend that a suspect be arrested").

Petitioner nonetheless contends that absolute immunity is required because respondent's arrest was made pursuant to a warrant, the *act* of seeking the warrant is prosecutorial, and the Court is prohibited from examining the function for which the warrant was *actually* sought. Pet. Br. 21-27. Thus, petitioner contends that the use of the statute in this case provides a complete shield – even though he does not dispute that the statute may indeed have been used for an investigative function in this instance.

Petitioner's argument is inconsistent with this Court's case law and with the very premise of the functional approach to absolute immunity. Indeed, if petitioner's argument were adopted, the district courts and courts of appeals would have the burden of rigidly classifying every legal act as inherently

prosecutorial or investigative, regardless of the circumstances.

2. The Court's decision in *Buckley* is instructive. There, prosecutors were sued for their role in interviewing witnesses to manufacture false evidence for use at trial. 509 U.S. at 272-76. The Court denied absolute immunity, rejecting the prosecutor's categorical position that interviewing witnesses and "obtaining, reviewing, and evaluating evidence" are "always protected by absolute immunity." *Id.* at 276 n.7 (internal quotation marks omitted). But, conversely, the Court did not suggest that the act of interviewing witnesses was always investigative.

Rather, the issue was "whether the prosecutors ha[d] carried their burden of establishing that they were functioning" in their prosecutorial role when conducting the particular interviews in that case. *Id.* at 274. The Court accordingly engaged in a "careful examination of the allegations concerning the conduct of the prosecutors" and concluded that the prosecutor's "mission at that time was entirely investigative in character," noting, among other things, that the interviews occurred well before there was probable cause to arrest anyone for the crime. *Ibid.*; *see id.* at 274 n.5 (rejecting bright-line rule that all actions by a prosecutor receive absolute immunity once probable cause is established; noting that even post-probable cause, a prosecutor might engage in non-immune

"investigative work") (internal quotation marks and citation omitted).

Justice Kennedy, dissenting on this issue, concluded that the prosecutors were entitled to absolute immunity for their role in the interviews. *Id.* at 282 (Kennedy, J., concurring in part and dissenting in part). Critically, however, he agreed with the majority that the same act can serve different functions, but disagreed that the prosecutors in that case were engaged in investigation.

In the dissent's view, although the police in that case were interviewing the witnesses for investigative reasons, the prosecutors were doing so to further trial-type prosecutorial functions: "Two actors can take part in similar conduct . . . while doing so for different reasons and to advance different functions. . . . The conduct is the same but the functions distinct." *Id.* at 289. Like the majority, the dissent recognized that there might be cases that presented close calls, but believed that district courts would be able to make those assessments by paying "careful attention to subtle details" in the case. *Ibid.* As the dissent noted, the "precise reason" for adopting a "functional" approach to immunity was to avoid the necessity of rigid categories in which an act was always either prosecutorial or investigative. *Ibid.*

Petitioner dismisses *Buckley* on the ground that the Court looked at "objective factors" in assessing the "'*conduct* of the prosecutors'" in that

case. Pet. Br. 23 (quoting *Buckley*, 509 U.S. at 274, emphasis supplied by petitioner). But that argument concedes respondent's central point: that the same act can serve different functions depending on the circumstances.

Moreover, there is plenty of similarly objective evidence in this case, including the allegations that the FBI conducted surveillance of respondent; that the warrant was sought even though respondent never failed to attend a single meeting with the FBI; that respondent was never asked if he would testify or be willing to relinquish his passport; that respondent was never deposed or called to testify – despite the year-long period between his arrest and the trial; that petitioner and other high-ranking officials made statements about the post-September 11 use of the material witness statute; and that the FBI Director pointed to respondent's arrest as one of the United States' major successes in the war on terrorism. J.A. 37 (FAC ¶ 100).

Here, Judge Lodge – who also presided in the underlying *Al-Hussayen* trial and at respondent's release hearing – concluded that these allegations pointed toward an investigative function. There is no reason why district courts are incapable of making this type of determination. *Buckley*, 509 U.S. at 290 (Kennedy, J., concurring in part and dissenting in part) (expressing "confidence" that district courts can make individualized functional inquiries "with some accuracy").

Indeed, courts have long understood that this Court's immunity jurisprudence requires careful attention to the circumstances of each case to determine the precise function in which a prosecutor was engaged. *See, e.g.*, *Rivera v. Leal*, 359 F.3d 1350, 1354 (11th Cir. 2004) (examining prosecutor's actions and rejecting contention that they were investigatory because "[t]here is no indication that [the prosecutor] was trying to establish probable cause to arrest [plaintiff]"); *Cousin v. Small*, 325 F.3d 627, 635 (5th Cir. 2003) (examining prosecutor's actions in witness interview and concluding that "[t]he interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause"); *Pachaly v. City of Lynchburg*, 897 F.2d 723, 727 (4th Cir. 1990) (affirming summary judgment because there was no "evidence" showing that the prosecutor's post-indictment search was for the investigative function of obtaining evidence of *other* crimes).

Thus, contrary to petitioner's contention, the court of appeals in this case did not invent its own immunity test. Pet. Br. 21; *see* Pet. App. 23a-24a (explicitly applying "functional" test and rejecting petitioner's contention that all legal acts are "inherently either prosecutorial or investigative"). Nor is the court of appeals' decision inconsistent with the circuit decisions cited by petitioner in which prosecutors were granted absolute immunity for seeking material witness warrants. Pet. Br. 17-18. None of those cases involved an allegation that the

prosecutor was using the statute for investigative purposes; in each case it was indisputable that the prosecutor was genuinely seeking testimony and believed it could not be secured without the witness's arrest. *See, e.g., Betts*, 726 F.2d at 81 (arrest came only after primary witness failed to appear on day of trial); *Daniels*, 586 F.2d at 66, 69 (prosecutor "was attempting to secure Daniels's presence at the resumption of trial").

3. Petitioner argues that courts should not be permitted to pierce absolute immunity by looking at whether a prosecutor's actions were investigatory if they cannot do so even where the prosecutor acts for truly egregious reasons, such as for political motives. Pet. Br. 21-22. But, as discussed above, courts must be able to look at the nature of an action to make the *threshold* determination of whether the prosecutor was actually engaged in a prosecutorial function in the first place. Petitioner cannot turn the doctrine on its head and invoke the protection of absolute immunity before he has even made the threshold showing that he was engaged in a prosecutorial function.

Petitioner's reliance on *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), is likewise misplaced. Pet. Br. 18-19. In *Goldstein*, the Court held that a supervisor could not be denied absolute immunity for a policy if the only way in which the policy caused harm was through its implementation in individual cases and the individual actors who implemented the policy in each case *were* entitled to

absolute immunity. But the Court has long held that the converse is also true: a supervisor should not receive absolute immunity where the individuals acting at his direction are entitled only to qualified immunity for their conduct.

In *Burns*, 500 U.S 478, for example, the prosecutor did not direct (much less order) the police to take any action, but simply advised them that a search technique was lawful and that they likely had probable cause to arrest the suspect. Yet even under those circumstances, the Court held that the prosecutor should not have absolute immunity for "giving advice" if the police officers receive "only qualified immunity for following the advice." *Id.* at 495. Here, petitioner is alleged to have done more than provide advice. His policy directed and authorized the illegal actions.

4. More generally, petitioner contends that respondent's approach to absolute immunity is inconsistent with the objective test used in the qualified immunity analysis and will undermine the functioning of the judicial system. Pet. Br. 25. But the qualified immunity test does not mean that every case can be decided conclusively on the face of the complaint. Rather, where a purpose inquiry is required to resolve the merits of a case, factual development may be necessary, thereby preventing the qualified immunity question from being decided on a motion to dismiss. *See Crawford-El v. Britton*, 523 U.S. 574, 598-601 (1998) (explaining that where plaintiffs make specific, non-conclusory allegations

regarding defendant's unlawful motive, factual development may be necessary before immunity question can be resolved). Thus, under both the qualified immunity and absolute immunity tests, limited factual development may occasionally be necessary. But just as district courts can be trusted to distinguish plausible allegations from fanciful ones, *see Iqbal*, 129 S. Ct. 1937, so too can they "tailor discovery" to ensure the question is resolved at an early stage. *Crawford-El*, 523 U.S. at 598.

Nor will the functioning of the judicial system be undermined if prosecutors are not afforded absolute immunity in this case. Pet. Br. 24-27. As previously discussed, *see supra* at pp. 33-34, the material witness statute is infrequently used in non-immigration cases. And, even in the relatively few non-immigration cases where the statute is used, it will be rare that a witness could plausibly allege that he would not have been arrested "but for" the government's interest in detaining and investigating him.

Moreover, witnesses have far less protection than defendants under the judicial system. In granting prosecutors absolute immunity for certain functions, the Court has stressed that defendants will still have the full adversary judicial process to protect their rights. *Imbler*, 424 U.S. at 427, 430-31. In fact, in every one of this Court's cases in which absolute immunity was afforded to a prosecutor – from *Imbler* to *Goldstein* – the plaintiff was an individual who had been criminally charged and/or

prosecuted. *Cf. Mitchell*, 472 U.S. at 513-14 (denying absolute immunity to the Attorney General in case where the plaintiff was not himself the criminal defendant, but was affected by a wiretap aimed at a third party). The arrest of witnesses, however, takes place largely out of the public eye, and without the full protections afforded defendants.

In sum, absolute immunity is unwarranted in those rare cases where a witness can plausibly plead that he would not have been arrested but for the desire to detain and investigate him. Allowing such suits will not undermine "the functioning of the criminal justice system," *Imbler*, 424 U.S. at 426, but will have the salutary effect of deterring the deliberate use of the material witness statute as a preventive detention and investigation tool.

Indeed, if the prosecutor in this case had simply detained respondent without a material witness warrant in order to investigate him, there would be no question that the prosecutor was engaged in investigative activity. That the prosecutor used the material witness statute to achieve the same ends should not alter the immunity result. *Cf. Buckley*, 509 U.S. at 276 (stressing that a "prosecutor may not shield his investigative work . . . merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability . . . by ensuring that they go to trial").

C. Petitioner Is Not Entitled To Greater Immunity Than The FBI Agents He Directed.

As shown above, petitioner is not entitled to absolute immunity because he directed the line prosecutors to use the statute as an investigative tool, and they in turn are not entitled to absolute immunity for doing so. But even apart from his role in directing the line prosecutors, petitioner also directed FBI agents to submit affidavits in support of material witness warrants – a distinct function that does not receive the protection of absolute immunity.

1. The complaint alleges that the FBI affidavit contained false statements and omissions. That claim is no longer at issue here. But the complaint also alleges that the FBI agents acted unlawfully by seeking the warrant to detain and investigate respondent and submitted the affidavit to further that end. J.A. 27 (FAC ¶ 56). Because the submission of an affidavit in support of a warrant does not receive absolute immunity, the agents understandably have requested only qualified immunity in this case. *See* J.A. 104-05 (district court decision); J.A. 9 (district court docket no. 55); *see also Malley*, 475 U.S. at 342-43 (police officer denied absolute immunity for submission of affidavit in support of arrest warrant); *Kalina*, 522 U.S. at 130-31 (prosecutor denied absolute immunity for submitting affidavit in support of arrest warrant).

The complaint further alleges that petitioner directed his unlawful material witness policy

through the Justice Department – including the FBI – and that this policy caused the unlawful arrest of respondent. J.A. 39-41, 48-49 (FAC ¶¶ 108-112, 114, 116, 137-40). Under this Court's cases, petitioner cannot claim greater immunity than the FBI agents acting at his direction. As the Court stated in *Burns*, 500 U.S at 495, it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice."

Indeed, like the FBI agents, FBI Director Mueller certainly could not have claimed absolute immunity had he adopted the policy at issue here and been named as a defendant in his personal capacity. If Director Mueller could not claim absolute immunity for adopting the policy and implementing it through his agents, petitioner likewise cannot do so for taking the very same action and implementing the policy through the very same law enforcement agents working for him.

2. Thus, even if petitioner were correct that seeking a material witness warrant is an act for which a prosecutor should enjoy absolute immunity, that immunity would not extend to cover the submission of an affidavit by the FBI agents. The agents and prosecutor were simply engaged in different functions – the prosecutor filed a motion for the warrant, while the FBI submitted factual material in the form of an affidavit. *See Kalina*, 522 U.S. at 131 (the submission of an affidavit is a

distinct "function" not entitled to absolute immunity).

Accordingly, even if the prosecutor had made the ultimate decision to seek the warrant, the FBI agents (acting pursuant to petitioner's policy) submitted an affidavit in court causing a warrant to issue. That action subjects them to liability, as *Malley* shows. *Cf. Hartman*, 547 U.S. at 265 (noting that law enforcement officers can be liable for "urging" a prosecutor to bring a retaliatory prosecution, even though the officers performed *no* role in court).

Insofar as petitioner is arguing that the FBI agents did not play a legally significant role in obtaining the warrant, that argument is both premature and erroneous. In *Malley*, 475 U.S. at 344 n.7, 346 n.9, the Court specifically rejected the argument that the police officer who sought the arrest warrant was shielded from liability by the magistrate judge's subsequent approval of the warrant application. If the actions of a *judge* do not shield a police officer, then the officers in this case are certainly not immunized by the fact that they operated in conjunction with a prosecutor.

Finally, petitioner contends that it makes no difference that the Attorney General is both the nation's chief prosecutor and law enforcement officer because the focus of the immunity analysis must be on the "function" the actor performed, and not his "identity." Pet. Br. 20. But that is precisely the point. Respondent's argument is not that the

Attorney General, in the abstract, performs prosecutorial and law enforcement functions, and that he can therefore be stripped of absolute immunity in every case based on his general responsibilities. Rather, respondent's argument is that *in this case* petitioner performed an investigative function by directing FBI officials to seek material witness warrants for investigative reasons.

This case is therefore similar to *Mitchell*, 472 U.S. at 520-24. There, the Court acknowledged that the Attorney General regularly performs law enforcement functions as well as prosecutorial functions. *Id.* at 520. But the Court concluded that he was not entitled to absolute immunity for authorizing the FBI to conduct investigatory wiretaps in *that* case – an act the district court held, after factfinding, was not prosecutorial, *id.* at 516, and that the Court concluded was also not covered by a "national security function" immunity. *Id.* at 521 (internal quotation marks omitted). Thus, as in *Mitchell*, petitioner is not entitled to absolute immunity for his role in directing the FBI to carry out a law enforcement activity.

In short, the FBI agents who submitted the affidavit are not entitled to absolute immunity. It would be "incongruous," *Burns*, 500 U.S. at 495, if petitioner were now to receive absolute immunity for his policy directing the agents.

* * *

Absolute immunity is an extraordinary protection, sparingly afforded by this Court. *Burns*, 500 U.S. at 486-87. Here, the complaint alleges that petitioner deliberately misused the material witness statute as a tool for preventive detention and investigation of a cooperative witness, bypassing the constraints normally imposed on arrests by the Fourth Amendment and effectively re-writing a federal statute without Congress's participation. As both the district court and court of appeals concluded, neither absolute nor qualified immunity is appropriate under these circumstances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 2011

REPLY BRIEF

17

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

No. 10-98

In the Supreme Court of the United States

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR PETITIONER

The court of appeals held that petitioner, the former Attorney General of the United States, may be subjected to litigation, and potentially to personal damages liability, based on an arrest that was authorized by a material-witness warrant issued by a federal magistrate judge pursuant to an Act of Congress. In reaching that conclusion, the court committed several legal errors. Respondent's efforts to defend the court's decision are unavailing.

As to both absolute immunity and qualified immunity, respondent's arguments rest on his claim that the prosecutors who sought a material-witness warrant had an improper subjective motive. Accepting his position would require this Court to adopt some test for identifying a proscribed motivation or purpose. While the court of appeals attempted to identify the prosecutor's "im-

mediate purpose," respondent now proposes that a subjective interest in investigation or preventive detention must not be a "but for" cause of seeking the warrant. That test for evaluating subjective prosecutorial motivations is impractical and confusing—so much so that, in articulating it, respondent appears to have conceded away a key premise of his theory of liability in this case.

This Court has held that a prosecutor is absolutely immune from suits for damages "when he acts within the scope of his prosecutorial duties." *Imbler* v. *Pachtman*, 424 U.S. 409, 420 (1976). Even the court below recognized that, as a general matter, seeking a material-witness warrant is a prosecutorial function that is protected by absolute immunity. For the first time in the course of this litigation, however, respondent argues that seeking a material-witness warrant is not subject to absolute immunity because there was no common-law tradition of immunity for such warrants. Respondent's claims about the common law are incorrect, and in any event, this Court has not held that immunity attaches only to judicial or prosecutorial actions expressly held by a common-law court to have been the subject of immunity. Rather, this Court has held that absolute immunity attaches to any activity "intimately associated with the judicial phase of the criminal process," which seeking a material-witness warrant undoubtedly is. *Id.* at 430.

Respondent's efforts to defend the reasoning of the court of appeals fare no better. In arguing that immunity ceases to apply if the prosecutor has an investigatory motive, respondent ignores cases establishing that subjective intent is irrelevant to the functional test for immunity. Respondent's theory also produces the startling result that a prosecutor would be entitled to abso-

lute immunity for seeking a material-witness warrant with malicious or vexatious motives, but not for seeking such a warrant with an intent to further a criminal investigation.

Even if petitioner were not entitled to absolute immunity, he is entitled to qualified immunity. The court of appeals believed that a detention based on a facially valid material-witness warrant violates the Fourth Amendment if the prosecutor has an investigative purpose. Respondent's arguments in defense of that conclusion are foreclosed by the decisions of this Court establishing that the Fourth Amendment prescribes an objective inquiry under which an officer's subjective purpose is irrelevant. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 808-810 (1996). Respondent goes beyond the court of appeals in arguing that the material-witness statute itself requires consideration of the prosecutor's subjective purpose, but that suggestion finds no support in the text of the statute. Finally, even if respondent's arrest did violate the Fourth Amendment, petitioner would still be entitled to qualified immunity because respondent has identified no source of law that clearly established the constitutional rule he now invokes.

I. PETITIONER IS ENTITLED TO ABSOLUTE IMMUNITY

As explained in the opening brief (at 17-18), it is well established that prosecutors are entitled to absolute immunity from claims arising from the decision to obtain a material-witness warrant. The court of appeals did not take issue with that proposition but instead held that immunity is unavailable if the prosecutor's "immediate purpose" is to investigate the suspect. Pet. App. 25a (emphasis omitted). Respondent, while distancing himself from the court's "immediate purpose" language,

argues for the same result. In his view, application of the functional test for absolute immunity means that the availability of immunity can vary depending upon the prosecutor's alleged motivation. That is not the law.

A. As an initial matter, respondent argues (Br. 46-52) that absolute immunity is inappropriate for a different reason: there is "no common-law tradition" of immunity for seeking a material-witness warrant. Respondent disclaimed that argument before the court of appeals and mentioned it only obliquely in his brief in opposition. Resp. C.A. Br. 31 ("[I]f the purpose of the material witness warrant in plaintiff's case were genuinely to secure his testimony against Al Hussayen, then a prosecutor could argue that it served a prosecutorial function."); Br. in Opp. 28-31. It therefore is not properly before the Court. See *Ortiz* v. *Jordan*, 131 S. Ct. 884, 892 n.6 (2011).

In any event, respondent's new argument is foreclosed by *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). In that case, the Court, relying "in part on common-law precedent, and perhaps even more importantly on the policy considerations underlying that precedent," *Kalina* v. *Fletcher*, 522 U.S. 118, 123-124 (1997), recognized that a prosecutor's absolute immunity "is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." *Imbler*, 424 U.S. at 422-423. The Court therefore held that a prosecutor's immunity extends to *all* activities "intimately associated with the judicial phase of the criminal process." *Id.* at 430. The Court explained that those activities include deciding "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against

particular defendants, *which witnesses to call*, and what other evidence to present." *Id.* at 431 n.33 (emphasis added). If the prosecutor is acting as "an officer of the court," he is protected by absolute immunity. *Ibid.*

Under this Court's cases, absolute immunity does not turn on a showing that each specific action taken by a prosecutor (or a judge) was expressly held by a common-law court to have been the subject of immunity. The question, instead, is whether the function at issue is one "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; see *Kalina*, 522 U.S. at 135 (Scalia, J., concurring) (noting that "the 'functional categories' approach to immunity questions * * * make[s] faithful adherence to the common law embodied in [Section] 1983 very difficult," but concluding that "both *Imbler* and the 'functional' approach are so deeply embedded * * * that, for reasons of *stare decisis*, I would not abandon them now"). Asking a court to issue a material-witness warrant in conjunction with an ongoing criminal proceeding plainly falls into that category. See Pet. Br. 17-18.

In any event, respondent fails to establish that prosecutors did not have common-law immunity for seeking or issuing material-witness warrants. The only cases respondent cites to support his assertion (Br. 51) are ones in which *private parties* were sued for damages for procuring the unlawful arrest of witnesses. See *Bates* v. *Kitchel*, 125 N.W. 684 (Mich. 1910); *Lovick* v. *Atlantic Coast Line R. Co.*, 40 S.E. 191 (N.C. 1901); cf. *Yaselli* v. *Goff*, 12 F.2d 396, 403-404 (2d Cir. 1926) (discussing considerations underlying immunity of *public* prosecutors), aff'd, 275 U.S. 503 (1927). While the court in *Bates* observed that the judicial officers involved in arresting the plaintiff were not immune from liability, it did so be-

cause those officers were "clearly acting outside of their jurisdiction." 125 N.W. at 686. Indeed, respondent and his amici rely upon numerous cases in which officers were held not to be immune for acts outside of the court's jurisdiction. See, *e.g.*, *Marsh* v. *Williams*, 2 Miss. (1 Howard) 132 (1834); *Clarke* v. *May*, 68 Mass. (2 Gray) 410, 412 (1854). Those cases have no application here because an act taken without jurisdiction would not be subject to immunity in any event. Cf. *Imbler*, 424 U.S. at 423 n.20 ("The immunity of a judge for acts *within his jurisdiction* has roots extending to the earliest days of common law.") (emphasis added).

Respondent emphasizes (Br. 48-49) that the common law generally did not provide absolute immunity for procuring an arrest or search warrant. As he acknowledges, however, the cases upon which he relies explicitly distinguished warrants sought in conjunction with the prosecution of an ongoing criminal case. See, *e.g.*, *Kalina*, 522 U.S. at 129 (absolute immunity for arrest warrant sought in conjunction with the prosecutor's filing of an information and other charging documents to initiate a case). In particular, respondent's reliance on *Malley* v. *Briggs*, 475 U.S. 335 (1986), is misplaced because in that case the Court distinguished between a law-enforcement officer seeking an arrest warrant and a prosecutor requesting an indictment, explaining that seeking a warrant, "while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Id.* at 342-343. As explained in the opening brief (at 17), seeking a material-witness warrant is a central part of "the judicial phase of criminal proceedings." *Id.* at 342. It is therefore subject to the rule of absolute immunity.

B. Respondent argues (Br. 52) that, even if seeking a material-witness warrant is generally a prosecutorial function to which absolute immunity would attach, immunity is unavailable when a prosecutor "deliberately use[s]" the warrant to investigate or detain a suspect. He purports to base that conclusion on this Court's functional test for evaluating absolute immunity, but his argument confuses function with purpose. This Court has held that prosecutors are absolutely immune from civil liability when they are performing "the traditional functions of an advocate," *Kalina*, 522 U.S. at 131, and, as explained in the opening brief (at 16), the prosecutor's subjective purpose is irrelevant in determining the nature of the function performed. See *Yaselli*, 12 F.3d at 403 ("[N]o public officer is responsible in a civil suit for a judicial determination, * * * however malicious the motive which has produced it.").

Like the court of appeals, Pet. App. 19a-20a, respondent relies (Br. 54-56) on *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), but that case does not support his position. Respondent correctly observes (Br. 56) that "the same act can serve different functions depending on the circumstances," but he fails to appreciate that the "circumstances" the Court examined in evaluating the acts in *Buckley* were objective factors such as whether the prosecutors had probable cause to arrest and whether judicial proceedings were pending at the time, not the subjective motives of the prosecutors. 509 U.S. at 274.

Respondent asserts (Br. 61) that "if the prosecutor in this case had simply detained respondent without a material witness warrant in order to investigate him, there would be no question that the prosecutor was engaged in investigative activity." Cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 522 (1985) (holding that absolute immunity

does not protect an official who engages in warrantless wiretapping, in part because such an act is not "subject to other checks" such as those provided by "the judicial process"). But the fact remains that the prosecutor *did* seek a material-witness warrant from the court, in conjunction with an ongoing criminal trial. That is what made the act prosecutorial in character. Nothing in this Court's cases suggests that the act can lose its prosecutorial character because of the motivation of the individual performing it. At bottom, the acts of deciding which witnesses may be required at a criminal trial, calling those witnesses, and seeking material-witness warrants or subpoenas to ensure their presence are all prosecutorial acts. While no personal damages action can be brought against a prosecutor regarding such matters, the "crucible of the judicial process," *Burns* v. *Reed*, 500 U.S. 478, 496 (1991) (quoting *Imbler*, 424 U.S. 440) serves as a significant check against a prosecutor who abuses his or her authority in performing those prosecutorial functions.

C. Respondent has no persuasive answer to the observation that, under his rule, the same act would yield different immunity decisions based upon the underlying motivation of the prosecutor. Indeed, he does not appear to dispute (Br. 58) that a prosecutor who sought a material-witness warrant based on nothing more than spite, vindictiveness, or racial animus would receive absolute immunity because his conduct would not be "investigative." But a prosecutor who sought such a warrant under exactly the same circumstances would receive no immunity if he acted with the intent to further an ongoing criminal investigation. Like the court of appeals, respondent offers no justification for that perverse result.

Respondent states (Br. 60) that the material-witness statute "is infrequently used," but that is hardly a reason to subject prosecutors to a personal money-damages action, based on nothing more than allegations about their motives, in those cases where the statute provides an important prosecutorial tool. See *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (noting that improper purpose is "easy to allege and hard to disprove") (citation omitted). Nor does respondent address the point, explained in the opening brief (at 26), that the logic of the decision below (and of his position) is not limited to material-witness warrants. Prosecutors often bring charges against lower-level offenders in circumstances where defendants could allege that their "immediate purpose" is not to proceed with a prosecution but to obtain information about more important suspects. Under respondent's theory, such an allegation would strip the prosecutor of immunity and entitle the criminal defendant, at a minimum, to obtain discovery about the prosecutor's motives.

D. Finally, respondent argues (Br. 62-65) that petitioner is not entitled to absolute immunity because, as Attorney General, he had authority over the FBI, and an FBI agent prepared an affidavit in support of the application for a material-witness warrant. But respondent's claim is not based on the affidavit—although respondent alleged that the affidavit contained false statements and omissions, he has abandoned any effort to hold petitioner liable on that basis. Br. in Opp. i. Instead, an essential element of respondent's claim is the submission of an application for a material-witness warrant by the prosecutor to the court. J.A. 39. As the official with responsibility for the exercise of that prosecutorial func-

tion, petitioner is entitled to absolute immunity. See *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 862 (2009).

II. PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY

A. Respondent's Arrest Did Not Violate The Fourth Amendment Or 18 U.S.C. 3144

Like the court of appeals, respondent does not question the facial validity of the material-witness statute. Instead, he argues that the Fourth Amendment prohibits the use of the statute where the prosecutor's subjective purpose is investigation or detention, and he goes beyond even the court of appeals in arguing that the statute itself prohibits its use in that context. Those arguments lack merit.

1. This Court has emphatically rejected the proposition that an officer's motive can invalidate an otherwise-lawful arrest. To the contrary, the Court has made clear its "unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Whren* v. *United States*, 517 U.S. 806, 813 (1996); see *Scott* v. *United States*, 436 U.S. 128, 138 (1978).

Respondent suggests (Br. 18-19) that this Court in *Whren* endorsed an inquiry into purpose, but that is incorrect. Rather, the Court merely acknowledged—and distinguished—cases permitting warrantless inventory searches and administrative inspections that were conducted in the absence of any probable cause or individualized suspicion, in which the Court had stated that the purpose of such searches was not to gather evidence for criminal cases. *Whren*, 517 U.S. at 811 (citing *Florida* v. *Wells*, 495 U.S. 1, 4 (1990), and *New York* v. *Burger*, 482 US. 691, 716 n.27 (1987)). Indeed, the Court emphasized that it had "*never* held, outside the context of in-

ventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Id.* at 812 (emphasis added).

Respondent points out (Br. 20) that *Whren* itself involved a traffic stop based on probable cause. See 517 U.S. at 813. The rule established in *Whren*, however, was not limited to that context. Instead, *Whren* stands for the broader proposition that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent," *id.* at 814, a proposition that this Court has applied in cases not involving seizures based on probable cause. For example, in assessing whether a tactile inspection of luggage constituted a search for Fourth Amendment purposes, the Court cited *Whren* for the proposition that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000). Similarly, in *United States* v. *Knights*, 534 U.S. 112 (2001), the Court again relied on *Whren* to conclude that "there is no basis for examining official purpose" in evaluating a search of a probationer based only on reasonable suspicion. *Id.* at 122. And courts of appeals, including the court below, have recognized that subjective intentions are immaterial when analyzing whether officers had "reasonable suspicion" to justify a stop. See *United States* v. *Willis*, 431 F.3d 709, 716 n.6 (9th Cir. 2005) ("To the extent the magistrate judge * * * [found] reasonable suspicion for a traffic stop lacking based on the officer's subjective motivations, we reverse. The parsing of police motives * * * is precisely what

Whren tells us we may not do."); accord, *e.g.*, *United States* v. *Winder*, 557 F.3d 1129, 1134 (10th Cir.), cert. denied, 129 S. Ct. 2881 (2009); *United States* v. *$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 84 (2d Cir. 2002) (Sotomayor, J.) ("Determination of probable cause (or reasonable suspicion) is an objective assessment.").

As explained in the opening brief (at 32), this Court has considered the purpose of law-enforcement activity only in the limited context of searches and seizures that lack an invidualized basis, and that may be justified, if at all, by the generalized interest that motivates the program under which they are conducted. See *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 45 (2000). Such activity is governed by different rules because it requires a "constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 710 (quoting *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981)). All of the cases cited by respondent (Br. 22-23) as supposedly establishing the appropriateness of considering purpose fall into that category. See *Edmond*, *supra* (suspicionless roadblocks); *Illinois* v. *Lidster*, 540 U.S. 419 (2004) (same); *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001) (drug tests of pregnant women conducted without probable cause or reasonable suspicion); *Michigan* v *Clifford*, 464 U.S. 287 (1984) (administrative searches); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) (same).

The considerations that led the Court to examine purpose in those cases are not present here. A material-witness arrest is conducted based on a warrant issued by a neutral magistrate after individualized consideration, with significant procedural protections for the person subject to the warrant. A judicial officer must evaluate the warrant application, together with the evi-

dence, to determine whether the testimony of the witness is "material in a criminal proceeding" and whether "it may become impracticable to secure the presence of the [witness] by subpoena." 18 U.S.C. 3144. A judicial officer also conducts a hearing at which the material witness may be heard with the assistance of court-appointed counsel. *Ibid.*; 18 U.S.C. 3142(f) (2006 & Supp. III 2009). The court may set conditions of release and may revisit its rulings at any time if circumstances change. 18 U.S.C. 3144; Fed. R. Crim. P. 46(h)(1) (requiring ongoing judicial supervision "[t]o eliminate unnecessary detention"); Fed. R. Crim. P. 46(h)(2) (requiring the government to provide biweekly reports on persons detained as material witnesses). Detention may continue only if the court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(e)(1) (2006 & Supp. III 2009). And the witness "may request to be deposed"; if the court orders a deposition to be taken, it "may discharge the witness after the witness has signed under oath the deposition transcript." Fed. R. Crim. P. 15(a)(2); see *Aguilar-Ayala* v. *Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992).

The court's determinations under Section 3144 establish the objective reasonableness of the detention, making the officer's subjective motivations irrelevant. Respondent asserts (Br. 37) that "a warrant procedure does not insulate improper Fourth Amendment activity from scrutiny," but that begs the question by assuming that there is something improper about conducting an arrest based on a valid warrant duly issued by a magistrate. The cases on which respondent relies establish only that an officer violates the Fourth Amendment

when he acts based on a facially insufficient warrant, see *Malley* v. *Briggs*, 475 U.S. 335 (1986), or a warrant obtained by submitting an affidavit that contains false statements, see *Franks* v. *Delaware*, 438 U.S. 154 (1978). This Court has never held that reliance on a *valid* warrant can violate the Fourth Amendment based on nothing more than a government official's subjective purposes.

In any event, even in the rare situations, such as *Edmond*, where the Court has considered law-enforcement purposes, it has cautioned that "the purpose inquiry * * * is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Edmond*, 531 U.S. at 48. In this context, therefore, the relevant purpose would be the purpose of the material-witness statute as a whole, but respondent makes no effort to show that there is anything improper about the purpose underlying Section 3144. Instead, he claims (Br. 41) that he is seeking "to determine the purpose of a systematic, deliberate policy" of using Section 3144 pretextually. That reasoning would turn *Whren* into little more than a pleading requirement, since it would be easy to allege that an officer who conducted an allegedly pretextual stop had adopted a "systematic, deliberate policy" of conducting such stops. Ultimately, accepting respondent's claim would require "prob[ing] the minds of individual officers"—something this Court has never permitted under the Fourth Amendment. *Edmond*, 531 U.S. at 48.

2. Although the court of appeals held that application of the material-witness statute in the circumstances of this case violated the Fourth Amendment, it did not suggest that the statute itself prohibited respondent's

arrest. See Pet. App. 40a; see also *id.* at 70a (Bea, J., dissenting). Respondent, however, contends (Br. 24-31) that Section 3144 precludes the use of a material-witness warrant for the subjective purpose of investigation or detention, even when the statute's "objective criteria" are satisfied. Indeed, he asserts (Br. 25) that a contrary interpretation would represent "an implausible reading of the statute." Respondent arrives at his reading of the statute with little discussion of the statutory language, which contains two requirements: that the testimony be material and that securing the presence of the witness be impracticable. 18 U.S.C. 3144. Those are objective criteria, and nothing in the statute calls for an inquiry into the motive or purpose of the prosecutor who seeks the warrant.

Rather than focus on the text of the statute, respondent attempts to demonstrate (Br. 27) that Congress did not intend "to turn the law into a detention and investigation tool." Congress provided an objective standard for obtaining a material-witness warrant, however, and that standard, on its face, does not turn upon the prosecutor's alleged motive. Cf. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

According to respondent (Br. 25), if the statute did not require an inquiry into the prosecutor's purpose, it would permit a person to be detained even if the government "informed the magistrate judge" that it "had no intention of using [his] testimony in a criminal proceeding." In such a case, it would be likely that at least one of the objective requirements of the statute was not satisfied—for example, the testimony was not "mate-

rial," or the witness's detention was not "necessary to prevent a failure of justice," 18 U.S.C. 3144—and the magistrate would therefore order release. But the subjective intent of the prosecutor would not be relevant to the magistrate's inquiry. When the requirements specified in the statute are met, then Section 3144 permits a witness to be detained, regardless of the prosecutor's motive in seeking detention.

B. Respondent's Standard For Evaluating A Prosecutor's Purpose Offers No Basis For Imposing Liability On Petitioner

As explained in the opening brief (at 38-40), the decision of the court of appeals, by requiring an intrusive, fact-intensive inquiry into purpose, would impede the use of the material-witness statute in cases in which the prosecutor wishes to ensure that a witness is available to testify but also seeks to investigate the witness for criminal wrongdoing. In response to that point, respondent concedes (Br. 31) that what he refers to as a "dual motive" arrest "would [not] violate either the Fourth Amendment or the statute." That concession eliminates any basis for imposing liability on petitioner in this case. Respondent goes on, however, to propose —for the first time in this litigation—a new standard. According to respondent (Br. 32), the Fourth Amendment and the statute itself are violated if the government would not have sought the warrant "*but for*" the government's interest in the individual as a criminal suspect. That test is unsupported by anything in Section 3144 or this Court's Fourth Amendment cases, and it would be even less workable than the test employed by the court of appeals.

1. In explaining his theory of permissible and impermissible prosecutorial purposes, respondent appears to have conceded away a key premise of his theory of liability in this case. Although respondent claims that there is no violation of the Fourth Amendment or Section 3144 in a case of "dual motives"—that is, a case in which the prosecutor seeks the witness's testimony and also has an investigatory interest in detaining the witness—the allegations in respondent's complaint fail to establish that this is not such a case. To the contrary, the complaint is carefully crafted to avoid any allegation that petitioner's alleged policy directed prosecutors to seek warrants in cases where there was no desire to obtain testimony. The complaint alleges that petitioner established a policy of seeking material witness warrants "as a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or to investigate for possible criminal wrongdoing (*i.e.*, to arrest 'suspects')." J.A. 39-40. It does not allege, however, that the object of the policy was to target individuals who were not *also* of interest as potential witnesses.

The complaint's additional allegations concern what persons other than petitioner did while implementing the alleged policy, coupled with allegations that petitioner is liable as a supervisor for his failure to correct the "abuses" carried out by his subordinates. Only in that context does the complaint allege that the purpose of the warrants was not to secure testimony. For example, the complaint alleges that "Defendants' purpose in arresting and detaining [respondent] was not to secure his testimony, but to preventively hold and investigate him for possible criminal wrongdoing." J.A. 40. But respondent offered nothing to show that *petitioner* had

any involvement in—or even knowledge of—his arrest. See E.R. 52-53 (declaration of Assistant United States Attorney stating, "I did not receive any instruction or direction from any senior DOJ official located in Washington, DC regarding the decision to apply for a material witness warrant for [respondent's] arrest.").

The only other allegation in the complaint relevant to the lack of a need for respondent's testimony again refers to the circumstances surrounding the arrest of respondent, and not to the policy allegedly adopted by the Attorney General. J.A. 52. As respondent made clear in his brief in the court of appeals, his claim that individuals (including respondent) were arrested under petitioner's material-witness policy even though their testimony was not being sought was an attempt to impose supervisory liability upon petitioner. Resp. C.A. Br. 39-40. Respondent has since abandoned his claim of supervisory liability, see Br. in Opp. i, and in any event such a theory, resting solely on petitioner's alleged acquiescence in the behavior of his subordinates, would not survive this Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948-1949 (2009).

Indeed, any suggestion that petitioner's policy included directions to seek material-witness warrants in the absence of a desire for testimony is belied by respondent's own allegations. For instance, respondent cites (Br. 8) a statement from the Assistant Attorney General for the Criminal Division that the material-witness statute is "an important investigative tool in the war on terrorism." J.A. 43. That statement goes on to say: "[Y]ou get not only testimony—you get fingerprints, you get hair samples—so there's all kinds of *evidence* you can get from a witness." *Ibid.* That statement suggests that the primary purpose of the material-witness warrants

was to obtain testimony, and the other "purposes" were viewed as secondary benefits. Accordingly, even under respondent's understanding of his test, there was no violation of Section 3144 or the Fourth Amendment in this case.

2. Respondent's description of his standard is internally contradictory, because if a "but for" test were applied in the way that "but for" causation is ordinarily understood, then it would prohibit the use of the material-witness statute even in many of the "dual motive" cases that respondent concedes are legitimate. As the Seventh Circuit has observed, "'[b]ut for' causation is a very weak sense of causation; in fact, it often falls short of the meaning of 'cause' in ordinary usage." *United States* v. *Dyer*, 216 F.3d 568, 570 (2000). And a consideration can be a "but for" cause of a decision even if it is one of several motivating factors for that decision. See, *e.g.*, *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct 2343, 2351 (2009). Accordingly, an interest in investigation or detention could easily be a "but for" cause of a material-witness arrest even in cases where prosecutors also "genuinely want the witness's testimony." Resp. Br. 31.

Depending on how it is applied, respondent's proposed "but for" standard could require even more inquiry into motives than the purpose inquiry contemplated by the court of appeals, requiring courts to determine which of many possible motives was the "but for" cause of an action. Every material-witness warrant could be subject to an allegation of improper motive, either in a direct challenge to detention or in a later action for damages. Contrary to respondent's suggestion (Br. 34), it is easy to make such an allegation, and a material witness who did so could subject the prosecutor to burdensome discovery, potentially undermining an on-

going investigation. The court would then have to conduct a factual inquiry into the prosecutor's motives to determine whether the prosecutor would have made the same decision in the absence of an investigatory motive. The prospect of such litigation would discourage prosecutors from employing the material-witness statute in situations, like those identified in the opening brief (at 38-40), for which it was designed and in which the public interest favors its use. See William P. Barr, et al. Amici Br. 24-28.

C. At A Minimum, Respondent's Arrest Did Not Violate Clearly Established Law

Even if the Fourth Amendment prohibited the use of a material-witness warrant in the circumstances of this case, petitioner would be entitled to qualified immunity because the constitutional rule now proposed by respondent was not clearly established at the time of his arrest in 2003. No source of law that existed in 2003—or, for that matter, at any time before the decisions of the courts below in this case—would have put petitioner on notice that detaining respondent based on a material-witness warrant issued by a federal magistrate judge could violate the Fourth Amendment. Indeed, even the decision of the court of appeals did not clearly establish the rule that respondent now advocates. The court held that a Fourth Amendment violation occurs only when the material-witness statute is used "for the purpose of criminal investigation," Pet. App. 40a (emphasis omitted), but respondent contends that the Constitution prohibits any arrest that would not have occurred "but for [the government's] interest in detaining and investigating" the witness as a suspect, perhaps even if the princi-

pal purpose is not detention or investigation, Br. 45 (emphasis omitted).

Like the court of appeals, respondent cites (Br. 43) only one case to support his position: a district court decision in which the court stated, in dicta in a footnote, that "[r]elying on the material witness statute to detain people * * * in order to prevent potential crimes is an illegitimate use of the statute." *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002), rev'd on other grounds, 349 F.3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005)); but see Pet. App. 129a (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, respondent candidly admits (Br. 44) that his argument "is not based on the existence of pre-2003 case law." He instead asserts that such case law is irrelevant here because a reasonable official "would not have needed a court to tell him" that seeking a material-witness warrant for investigative purposes violated the Constitution. He relies on *Hope* v. *Pelzer*, 536 U.S. 730 (2002), but that case does not support his position. Although the Court in *Hope* held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *id.* at 741, it also emphasized that "in the light of pre-existing law the unlawfulness must be apparent," *id.* at 739 (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). In this case, respondent's position finds support in no pre-existing law, and the fact that nine judges below vigorously disagreed with it strongly indicates that the law was not clearly established. See *Safford Unified Sch. Dist. No. 1* v. *Redding*, 129 S. Ct. 2633, 2644 (2009).

Finally, respondent states (Br. 43) that no court "has concluded that it would be lawful to use the material witness statute as a tool for preventive detention and in-

vestigation." Even if that observation were accurate—which it is not—it inverts the test for qualified immunity. As this Court has made clear, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was *unlawful* in the situation he confronted." *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)) (emphasis added). Like the court of appeals, respondent has not come close to demonstrating that this demanding standard was satisfied.

In any event, the lawfulness of the arrest in this case was established by the Second Circuit's decision in *United States ex rel. Glinton* v. *Denno*, 339 F.2d 872, 875 (1964), cert. denied, 381 U.S. 929 (1965). As explained in the opening brief (at 42-43), the court in *Denno* expressly rejected the contention that an investigatory motive invalidates a material-witness warrant that meets the objective requirements of the statute. That decision, which the Second Circuit did not question in *Awadallah*, demonstrates that a reasonable officer would not have understood that an investigatory motive invalidates an arrest based on an otherwise-valid material-witness warrant. Lacking a response to that precedent, respondent simply ignores it.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed. In the alternative, the portion of the decision below addressing supervisory liability should be vacated. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

FEBRUARY 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 20 2010
OFFICE OF THE CLERK

No. 10-98

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT,
Petitioner,

v.

ABDULLAH AL-KIDD,
Respondent.

**On Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit**

BRIEF OF WILLIAM P. BARR, BENJAMIN R. CIVILETTI, EDWIN MEESE III, MICHAEL B. MUKASEY, DICK THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Date: December 20, 2010

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(39)

QUESTIONS PRESENTED

Respondent was arrested on a material witness warrant issued by a federal magistrate judge under 18 U.S.C. § 3144 in connection with a pending prosecution. He later filed a *Bivens* action against Petitioner, the former Attorney General of the United States, seeking damages for his arrest. Respondent alleged that his arrest resulted from the former Attorney General's alleged policy of using the material witness statute as a "pretext" to investigate and preventively detain terrorism suspects. The Petition presents two questions; *amici curiae* address the following question only:

Whether the court of appeals erred in denying Petitioner qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of Respondent's arrest.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are five former Attorneys General of the United States and a public interest law firm.[1] They believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distracting prospect of having to defend damages claims filed against them in their personal capacity. They are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of constitutional claims. *Amici* also filed a brief in support of the petition for a writ of certiorari in this case.

Although this brief does not address the absolute immunity issue, *amici* fully support Petitioner's argument that the Complaint should also be dismissed on grounds of absolute immunity. They deem it vital that government officials be granted immunity from suit whenever they are carrying out prosecutorial functions.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Benjamin R. Civiletti served as

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

Attorney General of the United States from 1979 to 1981. He also served as Assistant Attorney General for the Criminal Division from 1977 to 1978 and as Deputy Attorney General from 1978 to 1979.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a federal judge on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It regularly appears in this and other federal courts to support the litigation immunity rights of public officials.

STATEMENT OF THE CASE

The material witness statute, 18 U.S.C. § 3144, permits a judicial officer to order an individual's arrest, provided that a party's affidavit makes two showings: (1) the person's testimony is material to a criminal proceeding; and (2) it may become impractical to secure

the person's presence at the criminal proceeding by subpoena.[2]

Respondent Abdullah Al-Kidd is an American citizen who was detained for a period of 15 days in March 2003 pursuant to the material witness statute. As the court of appeals recognized, Al-Kidd's constitutional claim acknowledges that an impartial magistrate judge determined that prosecutors made both of the requisite showings under § 3144. Pet. App. 14a (stating that the complaint concedes that Al-Kidd's circumstances "may have met the facial statutory requirements of § 3144."). Indeed, it is largely uncontested that: (1) Al-Kidd had numerous ties to Omar Al-Hussayen, a citizen of Saudi Arabia who, at the time of Al-Kidd's arrest, was under indictment for multiple false statements and visa-fraud offenses; and (2) Al-Kidd was arrested at Dulles International Airport as he was preparing to fly to Saudi Arabia for an extended period of study, and thus federal prosecutors might have had difficulty procuring his presence at Al-Hussayen's trial through use of a subpoena.

In March 2005, Al-Kidd filed suit against numerous federal government officials, including Petitioner John Ashcroft (who was serving as Attorney

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[2] Section 3144 provides in relevant part

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impractical to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title

General at the time of Al-Kidd's arrest), seeking to recover damages for alleged violation of his rights under § 3144 and the Fourth Amendment.[3]

Only one aspect of Al-Kidd's claims is relevant to issues now before the Court. Al-Kidd asserted that, in response to the September 11, 2001, terrorist attacks, Ashcroft and the Justice Department developed a policy of aggressive, "pretextual" use of the material witness statute in connection with terrorism investigations. The policy allegedly entailed using the statute to investigate and detain terrorism suspects whom the government lacked probable cause to charge criminally. While those arrested might well have met § 3144's prerequisites, the alleged policy authorized arrests even where prosecutors had little thought of calling the individual as a witness in ongoing proceedings and the primary motivation for the arrest was to investigate and detain the individual. Al-Kidd alleged that his arrest entailed just such "pretextual" use of the material witness statute. He alleged that his arrest violated the Fourth Amendment because it was primarily motivated by a desire to investigate him as a terrorism suspect, even though prosecutors lacked probable cause to believe that he had committed a crime.

Other aspects of Al-Kidd's claims are not relevant to issues before the Court. First, Al-Kidd asserted that FBI agents Scott Mace and Michael Gneckow included

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[3] Other defendants included FBI Director Robert Mueller, Michael Chertoff (who in March 2003 was serving as Assistant Attorney General in charge of the Justice Department's Criminal Division), and the two FBI agents who prepared the affidavit in support of the warrant application.

deliberately false statements in the affidavit submitted in support of the request for the material witness arrest warrant, and deliberately omitted material information. Al-Kidd initially asserted that many of the defendants, including Ashcroft, should be held liable for the allegedly false statements and material omissions. He asserted that the defendants' actions violated his Fourth Amendment rights (as well as his rights under § 3144) not to be detained on a warrant based on an agent's deliberate or reckless misrepresentations or omissions. The Ninth Circuit upheld Al-Kidd's right to proceed against Ashcroft based on the deliberate-false-statement claim. Pet. App. 47a-56a. However, in his response to the Petition, Al-Kidd stated that he has abandoned the claim with respect to Ashcroft, Respondent Cert. Br. at 21, and the Court did not grant review of the issue (Question 3 of the Petition).

Second, Al-Kidd asserted that the conditions of his 15-day confinement violated his constitutional rights. The Ninth Circuit held that the conditions-of-confinement claim should be dismissed with respect to Ashcroft because the complaint did not adequately plead his direct involvement in the issue. Pet. App. 59a. Al-Kidd did not seek review of that holding.

The individual defendants responded to the complaint by filing motions to dismiss. All of the motions were denied. Only Ashcroft filed an interlocutory appeal from the denial; the appeal asserted that dismissal was warranted on grounds of absolute and qualified immunity.

A divided Ninth Circuit panel affirmed. Pet. App. 1a-64a. The appeals court held that the complaint

concerned Ashcroft's performance of an investigatory function and that absolute immunity claims could be asserted by prosecutors only when they engage in activities associated with the judicial phase of the criminal process, not when (as alleged here) they are undertaking investigations. *Id.* at 14a-27a.

The appeals court also rejected Ashcroft's assertion that the qualified immunity doctrine required dismissal of the Fourth Amendment "pretextual use" claim. *Id.* at 30a-47a. The court held that Ashcroft could be subject to Fourth Amendment liability under a theory that he "set in motion a policy and/or practice" that caused Justice Department personnel to arrest individuals under the material witness statute where their real purpose in doing so was to hold the individuals preventively or to investigate further. *Id.* at 30a. The court cited *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), for the proposition that a government program violates the Fourth Amendment if: (1) its primary purpose is to conduct criminal investigations; and (2) it entails the seizure of individuals without probable cause to believe that they have committed a criminal offense. *Id.* at 36a-39a.

The appeals court held that qualified immunity was unwarranted because the unconstitutionality of Ashcroft's actions was "clearly established" at the time of Al-Kidd's arrest. Pet. App. 40a-47a. Although it conceded that in March 2003 "no case had squarely confronted" the constitutionality of "pretextual" use of the material witness statute, *id.* at 41a, the court held that *Edmond* and similar cases "put Ashcroft on notice" that "investigatory programmatic purpose would invalidate a scheme of searches and seizures without

probable case." *Id.* at 43a.

Judge Bea dissented from all aspects of the majority decision discussed above. *Id.* at 64a-105a. He asserted that Ashcroft was entitled to qualified immunity on the "pretextual use" claim because: (1) under the Fourth Amendment, an arresting officer's "subjective intentions are irrelevant so long as the officer's conduct is objectively justified," and Al-Kidd did not dispute that the objective criteria set forth in § 3144 were satisfied in his case, *id.* at 70a-71a; and (2) even if Al-Kidd's arrest on a pretextual material witness warrant violated his Fourth Amendment rights, such rights were not "clearly established" in March 2003. *Id.* at 84a. He also disagreed with most aspects of the majority's holding that Ashcroft was not entitled to absolute immunity. *Id.* at 92a-104a.

In March 2010, the appeals court denied Ashcroft's petition for rehearing en banc. *Id.* at 106a. Judge O'Scannlain, joined by seven other judges, issued an opinion dissenting from the denial. *Id.* at 122a-131a.

SUMMARY OF ARGUMENT

Qualified immunity not only provides government officials with a defense to liability, it also is "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet the decision below calls into question

the ability of high-level Executive Branch officials ever to prevail on a qualified immunity defense raised at the pleadings stage of a *Bivens* action. As former senior Executive Branch officials, the individual *amici curiae* are concerned about the disruptive effects of such discovery, and they fear that the decision below may deter Attorneys General from exercising the full range of their lawful authority to protect the security of the United States. The qualified immunity doctrine was designed to prevent such disruptions, especially when (as here) the challenged actions involve sensitive national security issues.

Particularly troubling is the Ninth Circuit's holding that the unconstitutionality of Ashcroft's conduct was "clearly established" at the time of Al-Kidd's arrest in March 2003. The appeals court conceded that it could point to no reported decision holding that an objectively valid material witness warrant could violate the Fourth Amendment merely because the prosecutor's primary motivation was preventive detention or to investigate the defendant. Its "clearly established" conclusion was based on little more than a generalized assertion that Ashcroft should have known in 2003 that the Fourth Amendment prohibits unreasonable searches and seizures. Pet. App. 43a ("[T]he history and purposes of the Fourth Amendment were known well before 2003.") But if courts permit the "clearly established" require-ment to be viewed at that high level of generality, the qualified immunity doctrine will be robbed of much of its vitality. As Judge O'Scannlain stated in his dissent, "If [awareness of Fourth Amendment history] is sufficient clearly to establish how the Fourth Amendment applies in a particular setting, then how can *any* Fourth

Amendment rule ever *not* be 'clearly established?'" *Id.* at 128a (emphasis in original).

Moreover, the appeals court decision effectively declares the material witness statute unconstitutional, at least as applied to Al-Kidd. Given the centuries-long pedigree of that statute, there is little historical support for the assertion that the drafters of the Fourth Amendment intended to prevent the detention of witnesses for whom the government lacks sufficient evidence of wrongdoing. The material witness statute is an extremely important tool in enforcing the criminal law. The appeals court decision inevitably will cause prosecutors to be more reluctant to make use of the statute out of fear that such use could lead to a lawsuit requesting a monetary judgment against the prosecutors in their personal capacities. Ironically, reduced use of the material witness statute could work to the detriment of those under investigation; § 3144 includes provisions that afford far greater procedural protections to individuals than do alternative tools available to federal authorities.

ARGUMENT

I. THE DECISION BELOW THREATENS THE ABILITY OF FEDERAL OFFICIALS TO PREVAIL AT THE PLEADINGS STAGE ON A QUALIFIED IMMUNITY DEFENSE

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court

explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow v. Fitzgerald, 457 U.S. 800, 817 n.29 (1982).

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against

> high officials in recent years only confirms the rationality of this anxiety. The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit.

Mitchell, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

Events proved Justice Stevens prescient. Lawsuits seeking damages from senior Executive Branch officials for actions they took regarding national security matters proliferated throughout the administrations of Presidents Bill Clinton and George W. Bush. In many instances, federal courts denied motions urging dismissal based on qualified immunity claims, and the officials involved were required to devote years to fending off the claims for damages. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (suit against Attorney General and FBI Director regarding detention of aliens arrested in connection with 9/11 investigation); *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) (same); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (suit against Attorney General, Secretary of Homeland Security, and FBI Director regarding rendition to Syria of citizen of Syria and Canada), *cert. denied*, 130 S. Ct. 2d 3409 (2010); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2008) (suit against Secretary of Defense regarding treatment of enemy combatants held at Guantanamo Bay, Cuba), *cert. denied*, 130 S. Ct. 1030 (2010); *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003) (suit against Attorney General arising from execution of an arrest warrant for six-year-old Elian Gonzalez); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010) (suit against Secretary of

Defense regarding treatment of enemy combatants in Iraq). The proliferation of such suits is a strong indication that, as currently understood by the lower federal courts, the qualified immunity doctrine is not serving to provide government officials with the protections against litigation burdens that this Court intended to provide.

A. The Qualified Immunity Doctrine Was Crafted to Reduce the Burden on Government Officials of Defending Against Damages Claims

In an effort to reduce the litigation burden of government officials, the Court has crafted a qualified immunity doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Mitchell*, 472 U.S. at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "insubstantial claims [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640 n.2. *See also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

Qualified immunity shields a government official from liability in an individual capacity so long as the official has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome the

defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a statutory or constitutional right; and (2) the right was clearly established at the time of the deprivation. *Saucier*, 533 U.S. at 199. Court are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, ___, 129 S. Ct. 808, 818 (2009). *Amici* submit that the Ninth Circuit's error is particularly clear with respect to the second prong – whether the asserted right was "clearly established" – and thus urge the Court to focus on that aspect of the decision below.

B. Under the Ninth Circuit's Ruling, Virtually Every Alleged Violation Will Be Deemed "Clearly Established"

The Ninth Circuit conceded that it could point to no reported decision whose holding directly supported its conclusion: that an objectively valid material witness warrant could violate the Fourth Amendment merely because the prosecutor's primary motivation was preventive detention or to investigate the defendant. In determining that it was "clearly established" that such "pretextual" use of § 3144 violated the Fourth Amendment, the appeals court could point to little more than the lengthy Fourth Amendment history of requiring the government (in most instances) to have probable cause to believe that an individual has committed a criminal offense before arresting the individual. Pet. Ap. 42a-45a.

If that history were sufficient to meet the "clearly established" requirement, then it would be exceedingly difficult for a government official to demonstrate that any Fourth Amendment rule is not clearly established. Indeed, it would suggest that the unconstitutionality of the material witness statute itself is "clearly established," even though that statute has been used throughout American history to detain individuals who the government has no reason to believe have committed a criminal offense.[4]

Moreover, the Ninth Circuit's "clearly established" finding is undercut by the numerous decisions of this Court that have recognized exceptions to the general proposition that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37. *See, e.g., City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (upholding suspicionless searches of government employee pager messages, to determine the efficacy of monthly limits on the number of free messages); *Illinois v. Lidster*, 540 U.S. 419 (2004) (upholding suspicionless seizure of motorists at highway checkpoint for purpose of obtaining information about a recent crime); *Bd. of Education v. Earls*, 536 U.S. 822 (2002) (upholding random drug testing of students involved in extra-curricular activities as a means of preventing drug

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[4] *See* Pet App. 126a (O'Scannlain, J., dissenting from the denial of rehearing *en banc*) ("The federal material witness statute has existed since 1789, *Bacon v. United States*, 449 F.2d 933, 938 (9th Cir. 1971), every state has adopted a version of the statute, *id.* at 939, and (at least until now), '[t]he constitutionality of th[e] statute apparently has never been doubted,' *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929).").

abuse); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random drug testing of student-athletes); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding suspicionless seizures of motorists at highway sobriety checkpoints designed to remove drunk drivers from the road); *Treasury Employees v. von Raab*, 489 U.S. 656 (1989) (upholding random drug testing of Customs employees); *Skinner v. Ry. Labor Executives' Assn.*, 489 U.S. 602 (1989) (upholding drug testing of railway employees involved in train accidents); *New York v. Burger*, 482 U.S. 691, 702-04 (1987)(upholding warrantless administrative inspections of "closely regulated" businesses). The appeals court made no effort to explain why those decisions do not undercut its "clearly established" determination in this case.

The "clearly established" determination is also undercut by the numerous Ninth Circuit judges who disagreed not only with that determination but also with the panel's determination that Petitioner's alleged policy violated the Fourth Amendment. Judge Bea dissented from the majority's determination that the Fourth Amendment prohibits "pretextual" use of the material witness statute, Pet. App. 70a-84a, and eight members of the appeals court expressed a similar disagreement in their opinion dissenting from denial of rehearing *en banc*. *Id.* at 125a-128a. This Court has repeatedly cited the existence of a division of opinion among federal judges as evidence that a constitutional doctrine is not "well established." For example, in upholding the qualified immunity claims of police officers who violated Fourth Amendment rights by permitting a newspaper reporter to join them in executing the search of a residence, the Court deemed it highly significant that, following the

events giving rise to the lawsuit, a circuit split developed regarding the propriety of such media ride-alongs. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). *See also Pearson*, 129 S. Ct. at 823; *Morse v. Frederick*, 551 U.S. 393, 430 (2007) (Breyer, J., concurring in judgment in part and dissenting in part) (urging dismissal of constitutional claims against school administrator on grounds of qualified immunity and arguing, "[T]he fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear."). The fact that eight appeals court judges believed that Al-Kidd had not alleged a constitutional violation similarly suggests that any constitutional violation in this case was not clearly established.

To support its "clearly established" determination, the appeals court relied primarily on *Edmond*, which held that the Fourth Amendment prohibits a police force from randomly stopping cars at highway checkpoints for the purpose of detecting evidence of ordinary criminal wrongdoing (in that case, possession of unlawful drugs). 531 U.S. at 44. But given that the stops at issue in *Edmond* were undertaken at the sole discretion of police officials, it is difficult to discern why *Edmond* should have caused government officials to question the constitutionality of material witness arrests made pursuant to warrants issued by magistrate judges who determined that prosecutors met the objective criteria

set forth in § 3144.[5] When a judicial officer has determined that a search or seizure is warranted, there is good reason to conclude that the proposed government action does not violate the Constitution – because the officer has no vested interest in the outcome. As Justice Jackson observed:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

The Court has explained the "clearly established" requirement as follows:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified

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[5] The Ninth Circuit also misconstrued *Edmond*'s discussion regarding when it is proper for courts to examine the "programmatic purpose" of government conduct for the purpose of determining whether the scheme passes constitutional muster. Section II of this brief explains in more detail why *Edmond* does not support the appeals court's understanding of the Fourth Amendment.

> immunity unless the very action in question has previously been held unlawful; but it is to say that in light of preexisting law the unlawfulness must be apparent.

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting *Anderson*, 483 at 640). The Ninth Circuit did not contend that any pre-2003 appellate case law had held that "pretextual" use of the material witness statute violated the Fourth Amendment. It nonetheless asserted that *Edmond* and similar cases "put Ashcroft on notice" that "investigatory programmatic purpose would invalidate a scheme of searches and seizures without probable cause." Pet. App. 43a.

But regardless whether the Ninth Circuit's understanding of *Edmond* is accurate, it cannot plausibly be asserted that such an understanding should have been "apparent" to law enforcement officials in 2003. *Edmond* arose in a context (traffic stops) far removed from the material witness statute. While *Edmond* held that the suspicionless seizures at issue in that case violated the Fourth Amendment, the Court has upheld suspicionless seizures in numerous other contexts. The Ninth Circuit provided no plausible explanation why Justice Department officials should have anticipated that courts would deem *Edmond* – rather than one of those other cases – to be controlling. The qualified immunity defense is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In light of the state of Fourth Amendment law in 2003 (and in 2010), Petitioner Ashcroft cannot reasonably be deemed to fall into either category.

The Ninth Circuit also erred by approaching the "clearly established" requirement at a far too high level of generality. *See, e.g.*, Pet. App. 43a ("[T]he history and purposes of the Fourth Amendment were known well before 2003."). It cited no decisions finding a Fourth Amendment violation under similar circumstances but rather based its "clearly established" determination on the general Fourth Amendment rule that, in most instances, a search or seizure requires individualized suspicion of wrongdoing. *Id.* at 42a-45a. But as the D.C. Circuit has pointed out:

> It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been "clearly established" in this country since 1791. Instead, courts must define the right to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Int'l Action Ctr. v. United States, 365 F.3d 20, 25 (2004) (Roberts, J.) (quoting *Anderson*, 483 U.S. at 639). To apply the "clearly established" requirement at a high level of generality would allow Al-Kidd "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violations of extremely abstract rights." *Anderson*, 438 U.S. at 639.

In sum, regardless whether Al-Kidd has adequately alleged a violation of his Fourth Amendment rights, *amici* respectfully submit that the Court should direct that the complaint be dismissed as to Petitioner Ashcroft because any such violation was not clearly established by pre-2003 court decisions.

II. AN ARREST IN COMPLIANCE WITH THE MATERIAL WITNESS STATUTE DOES NOT VIOLATE THE FOURTH AMENDMENT

The material witness statute, 18 U.S.C. § 3144, permits a judicial officer to order an individual's arrest, provided that a party's affidavit makes two showings: (1) the person's testimony is material to a criminal proceeding; and (2) it may become impractical to secure the person's presence at the criminal proceeding by subpoena. Al-Kidd acknowledges that federal law enforcement officials satisfied those two requirements, and that an impartial magistrate judge issued an arrest warrant based on those showings. Pet. App. 14a (Ninth Circuit determines that the complaint concedes that Al-Kidd's circumstances "may have met the facial statutory requirements of § 3144."). Thus, the issue before the Court is whether Ashcroft's alleged actions can be deemed a Fourth Amendment violation when those actions, Al-Kidd concedes, did not violate § 3144.[6]

Al-Kidd does not raise a facial challenge to the material witness statute. Pet. App. 31a. Rather, he contends that Justice Department officials violated the Fourth Amendment in attempting to apply the statute to him, because their use of the statute was pretextual. That is, Justice Department officials never intended to

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[6] In prior stages of the litigation, Al-Kidd asserted that Ashcroft had, indeed, violated § 3144. However, in response to the certiorari petition, Al-Kidd abandoned his claim that Ashcroft could be held accountable for allegedly false statements contained in the affidavit submitted in support of the request for a material witness warrant – thereby abandoning his § 3144 claim. Section IV below explains why that claim must be deemed to have been abandoned.

call him as a witness at the trial of Omar Al-Hussayan and arrested him based primarily on a desire to investigate him as a terrorism suspect (and could not have made a regular arrest because they lacked probable cause to believe that he had committed a crime).

The Ninth Circuit attempted to tie Ashcroft to the allegedly pretextual arrest by pointing to a number of his pre-2003 speeches. For example, the appeals court quoted an October 2001 speech in which Ashcroft stated, "Aggressive detention of lawbreakers and *material witnesses* is vital to preventing or disrupting new attacks." *Id.* at 7a. Importantly, neither the Ninth Circuit nor Al-Kidd asserts that Ashcroft ever suggested that prosecutors should seek material witness warrants even in cases in which the § 3144 criteria had not been met.

Moreover, although Al-Kidd asserts that prosecutors in *his* case sought a material witness warrant for the primary purpose of detaining a suspected terrorist, he does not allege that that was the sole use or even the primary use that prosecutors made of § 3144 during the relevant time period. Respondent Cert. Br. 17 (contending that "nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify" – meaning, of course, that a majority of those detained under § 3144 in connection with terrorism investigations *were* called to testify).

In light of those concessions, Al-Kidd cannot state a Fourth Amendment claim against Ashcroft. As the Ninth Circuit conceded, this Court has repeatedly avoided examining the subjective intentions of individual

law enforcement officers in determining whether a search or seizure violates the Fourth Amendment. "An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (citations omitted).[7] Accordingly, in light of Al-Kidd's concession that the § 3144 criteria were met in this case, Ashcroft cannot be deemed to have violated Al-Kidd's Fourth Amendment rights even if, as alleged, local prosecutors never intended to call Al-Kidd as a witness.

Edmond is not to the contrary. *Edmond* explicitly recognized that, if a government official has a legitimate interest in detaining an individual, courts should not "look behind that interest to determine whether the government's primary purpose is valid," and that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 531 U.S. at 45 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)). *Edmond* recognized a limited exception to that general rule: where the government adopts a "general

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[7] In *Brigham City*, the Court held that so long as it was objectively reasonable for police officers to enter a house without a warrant (for the purpose of breaking up a fight and preventing injury), it was irrelevant for Fourth Amendment purposes that their primary motivation for entering was to make arrests. 547 U.S. at 404-06. Similarly, the Court held in *Devenpeck v. Alford*, 543 U.S. 146 (2004), that an arrest was "reasonable" and thus did not violate the Fourth Amendment so long as the known facts provided probable cause for the arrest – even though the defendant alleged that the arresting officer was improperly motivated. That is, he alleged that the only reason he was seized was the arresting officer's belief that the defendant had engaged in conduct that was not illegal. *Id.* at 153-55.

scheme" whereby searches or seizures are undertaken without individualized suspicion, courts may examine the scheme's "programmatic purpose" to determine whether the scheme passes Fourth Amendment muster. *Id.* But Al-Kidd is not asking the courts to undertake a "programmatic" review of federal government use of the material witness statute, because he makes no claim that more than a small fraction of government uses of the statute has been "pretextual" in nature. Rather, he asserts that use of the statute was "pretextual" *in his particular case*.[8]

At most, Al-Kidd is asserting that Ashcroft's policies made it more likely that local prosecutors would resort to "pretextual" use of the material witness statute. Even so, Al-Kidd cannot prevail on his Fourth Amendment claim without, at a minimum, demonstrating that local prosecutors *in his case* were acting pretextually. That sort of inquiry into the subjective motivation of individual law enforcement officers has been deemed irrelevant to Fourth Amendment analysis by *Whren*, *Devenpeck*, *Brigham City*, and a long line of decisions

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[8] Critics of the use of the material witness statute have alleged that federal prosecutors, in the course of investigating terrorists in the aftermath of the 9/11 attacks, invoked the material witness statute to detain as many as 70 individuals (almost all or whom were Muslim). *See, e.g.*, Human Rights Watch, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11* (2005), at 1. As noted, Al-Kidd concedes that, in a majority of those cases, the individual was called as a witness – thereby suggesting, in at least those cases, that prosecutors had sought a material witness warrant because they wanted to secure future testimony. And of course, those 70 cases represent no more than a tiny fraction of the thousands of occasions each year that the material witness statute is invoked by the federal government.

from this Court. *See generally*, Donald Q. Cochran, *Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start*, 18 GEO. MASON L. REV. 1 (2010). And Al-Kidd cannot plausibly claim a causal connection between the Justice Department's "aggressive" § 3144 enforcement policies and his injuries without demonstrating at trial that local prosecutors were acting pretextually.

In sum, *Edmond*'s "programmatic purpose" exception does not support Al-Kidd's reliance on the subjective motivations of law enforcement officials as the basis for a Fourth Amendment challenge to an objectively valid use of the material witness statute. Al-Kidd does not challenge the entire material witness program, only its application in his case. Because it is undisputed that the objective criteria established by § 3144 were met in Al-Kidd's case, Ashcroft is entitled to dismissal of the Fourth Amendment claims.

III. THE NINTH CIRCUIT DECISION UNDERMINES EFFECTIVE USE OF THE MATERIAL WITNESS STATUTE

The Fourth Amendment prohibits searches and seizures that are "unreasonable." Determining the reasonableness of a government seizure requires a court to balance a number of competing factors: "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Lidster*, 540 U.S. at 427. *Amici* submit that the Justice Department's "aggressive" use of the material witness statute was a reasonable response to the national

security concerns that arose in the aftermath of the 9/11 attacks.[9]

The importance of material witness statutes for effective law enforcement is attested by their adoption by the federal government and all 50 States. *See* Dan Stigell, *Counterterrorism and the Comparative Law of Investigative Detention*, 50 (Cambria Press, 2009) (describing material witness statute as "the most potent weapon in the U.S. counterterrorism arsenal").[10] Federal prosecutors have made extensive use of § 3144 and its predecessors for many decades; recent critics are wrong in suggesting a sharp upswing in material witness warrants during the past decade.[11]

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[9] In assessing reasonableness, it is important to note that Al-Kidd was released relatively quickly. The Court has held that while detention of those not serving a criminal sentence may pass constitutional muster if it is relatively brief, it becomes progressively less reasonable as the duration of detention increases. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

[10] Among the high-profile convicted terrorists who initially were held on a temporary basis as material witnesses were Terry Nichols (Oklahoma City bomber); Zacarias Moussaoui (a member of the 9/11 conspiracy), Earl James Ujaama and Mahar Hawash (Americans convicted of providing support to the Taliban); and Jose Padilla (American convicted of conspiracy to engage in terrorism overseas).

[11] Citing data from the Administrative Office of the United States Courts, a Congressional Research Service report concluded that federal magistrate judges conducted an average of 3,948 material witness hearings each year during FY 2002 through FY 2004. That number was down somewhat from past decades; for example, 6,865 hearings were conducted during FY 1981 and 8,221 were conducted during FY 1980. Charles Doyle, *Arrest and Detention of Material Witnesses*, CRS REPORT FOR CONGRESS, at 3

The appeals court decision inevitably will cause prosecutors to be more reluctant to make use of the statute out of fear that such use could lead to lawsuits requesting monetary judgments against the prosecutors in their personal capacities. A recent report on anti-terrorism prosecutions succinctly summarized the dilemma regularly faced by prosecutors:

> Many of the individuals who were arrested on material witness warrants after 9/11 were likely viewed as potential suspects in addition to being material witnesses. Indeed, in most complex criminal investigations, it often is not clear whether an individual is primarily a witness or primarily a suspect; often they are potentially both. In many cases, as may well have been the fact after the 9/11 attacks, the government may suspect an individual but also want that individual's testimony if he is willing to give it.

Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts*, HUMAN RIGHTS FIRST (May 2008) at 70. If the Ninth Circuit decision stands, the prosecutor in a "mixed motive" case risks being held liable for damages if a jury later undertakes an examination of the prosecutor's subjective intent and determines that the predominant reason for a material witness arrest was the prosecutor's suspicion that the individual committed criminal acts. To avoid that risk, prosecutors are likely to avoid use of the material witness statute even if they believe that

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n.10 (Sept. 8, 2005) (available at www.au.af.mil/au/awc/awcgate/crs/rl33077.pdf).

detaining a witness is likely to yield valuable and otherwise-unavailable evidence for use at trial or before a grand jury.

Ironically, reduced use of the material witness statute could work to the detriment of those under investigation. If law enforcement officials are prohibited from making use of the material witness statute for a terrorism suspect, they will be forced to decide immediately among three options: (1) unconditional release; (2) charging a crime; or (3) designating the suspect an "enemy combatant." Requiring an immediate decision may not be in the best interests of either prosecutors or the suspect.

Given the potentially catastrophic consequences if law enforcement officials fail to act expeditiously on credible evidence regarding potential terrorist activity, they are unlikely to pursue the first option. The material witness statute provides an attractive alternative to the other two options – it allows prosecutors to protect the public safety as their investigation continues, while at the same time providing numerous procedural protections to individuals being detained. For example, they are entitled to a court-appointed lawyer and *must* be released following a deposition unless the court determines that release would result in a "failure of justice." Fed.R.Crim.P. 15(a)(2). District courts are charged with monitoring all material witness detentions to "eliminate unnecessary detention," and must receive from prosecutors every two weeks a report explaining why they believe that any ongoing detentions must continue. Fed.R.Crim.P. 46(a)(h)(1) & (2).

In contrast, those detained as enemy combatants have considerably fewer procedural rights. And those charged with a crime may well find that the initial charging decision – even in cases in which the existence of probable cause is in doubt – is not easily reversed. Granting prosecutors the option, in close cases, of holding a suspect temporarily under a material witness warrant provides prosecutors with breathing space and reduces the risk of a premature criminal charge or enemy combatant designation.

In sum, a decision affirming the Ninth Circuit will discourage use of the material witness statute – a development that will hamper criminal law enforcement without necessarily providing any corresponding benefit to criminal suspects.

IV. AL-KIDD HAS ABANDONED ANY CLAIMS AGAINST ASHCROFT BASED ON ALLEGED VIOLATIONS OF § 3144

The Ninth Circuit rejected Ashcroft's assertion that he was entitled to dismissal of the claim seeking to hold him personally liable for allegedly false statements included by FBI agents in the affidavit they submitted in support of the request for a material witness arrest warrant. The court held that Ashcroft could be held responsible for the false statements because, the Complaint alleged, he had inadequately supervised the work of the FBI agents. Pet. App. 52a. In response to the Petition, Al-Kidd stated that he had abandoned the deliberate-false-statement with respect to Ashcroft, Respondent Cert. Br. at 21, and the Court did not grant review of the issue.

By abandoning his deliberate-false-statement claim, Al-Kidd also abandoned his claim – asserted in the Complaint – that Ashcroft was liable for damages for violating § 3144. Al-Kidd's sole remaining claim against Ashcroft involves alleged violation of the Fourth Amendment. To guard against the possibility that Al-Kidd may nonetheless seek to reintroduce a § 3144 claim into the case, *amici* write briefly to explain why Al-Kidd has no remaining claims based on an alleged violation of § 3144.

The Ninth Circuit affixed the title, "The § 3144 Claim," to its discussion of Al-Kidd's deliberate-false-statement claim. Pet. App. 47a-56a. Al-Kidd broadly asserted that his arrest violated § 3144 because the affidavit of the FBI agents "fail[ed] to demonstrate probable cause for either the materiality of his testimony or the reasons it would be impracticable to secure that testimony by subpoena." *Id.* at 47a-48a. The court declined to permit a sweeping collateral challenge to a warrant that had been granted by a magistrate judge; rather, it made clear that Al-Kidd would be permitted to challenge the warrant only to the extent that he alleged that the affidavit supporting the warrant application contained false statements or material omissions:

> Although the arrest was conducted pursuant to a warrant issued by a magistrate judge, we allow challenges to the validity of searches and seizures conducted pursuant to a warrant if the affidavit in support of the warrant included false statements or materials that were made intentionally or recklessly.

Id. at 48a (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). Al-Kidd did not seek review from the Ninth Circuit's decision limiting the scope of his § 3144 claim. That decision is binding on him and limits his § 3144 cause of action to a claim that Ashcroft and other defendants deliberately included false statements or material omissions in the affidavit.

Accordingly, now that Al-Kidd has abandoned his deliberate-false-statement claim against Ashcroft, no issues are before the Court regarding alleged violations of § 3144. The absence of any claim regarding § 3144 violations means that each of the following factual allegations are irrelevant to the issues to be decided by this Court: (1) allegations that the FBI agents included false statements in their affidavit in support of the material witness warrant;[12] (2) allegations that the affidavit failed to demonstrate the materiality of Al-Kidd's testimony to the Al-Hussayen trial; and (3)

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[12] *Amici* note that the allegations of falsity are rather thin. For example, Al-Kidd claims that that he purchased a round-trip ticket to Saudi Arabia, while the affidavit stated that "Kidd is scheduled to take a one-way, first-class flight" to Saudi Arabia. Pet. App. 4a. Those statements are not necessarily in conflict. The affidavit did not say that "Al-Kidd *purchased* a one-way ticket," nor is that the necessary implication of the affidavit. A far more logical interpretation is that the affiant intended to convey that Al-Kidd did not intend to return to the United States in the near future. That assertion was entirely accurate, given Al-Kidd's intention to remain in Saudi Arabia for an extended period of study. In his brief opposing the petition, Al-Kidd disputed our contention that the allegations of falsity are thin and asserted that the affidavit stated that he had used "a 'one-way' ticket." Respondent Cert. Br. at 9 n.3. As the affidavit excerpt quoted above indicates, that assertion is demonstrably false; the affidavit uses the word "flight," not "ticket."

allegations that the affidavit failed to demonstrate that it would be impracticable to obtain Al-Kidd's testimony by subpoena. Some or all of those factual allegations may be relevant to the claims that Al-Kidd is continuing to pursue against other defendants, but they are irrelevant to resolution of the Fourth Amendment claims he is asserting against Ashcroft.

CONCLUSION

Amici curiae request that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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Dated: December 20, 2010

AMICUS CURIAE BRIEF

No. 10-98

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT,
Petitioner,
v.

ABDULLAH AL-KIDD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of The Center for Justice and Accountability as Amicus Curiae in Support of Respondent

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BRIEF OF THE CENTER FOR JUSTICE AND ACCOUNTABILITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICUS CURIAE*

The Center for Justice and Accountability (CJA) is an international human rights organization dedicated to the protection and promotion of human rights through law.[1] CJA is a non-profit legal advocacy center that works to deter severe human rights abuses through litigation, education, and outreach.

CJA represents survivors and their families in both domestic and foreign tribunals. Many of these cases include a claim of arbitrary detention, giving CJA considerable experience litigating claims of detention not authorized by governing law, as well as experience with the detention statutes of foreign states.

That experience brings us to the conclusion that Section 3144 cannot be found to allow for the preventative or investigative detention of U.S. citizens suspected of engaging in criminal activity.

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[1] Pursuant to Supreme Court Rule 37.6, CJA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than CJA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

SUMMARY OF ARGUMENT

There is a sharp distinction between the purpose of Section 3144, which authorizes the detention of witnesses to compel their testimony, and the purpose to which petitioner allegedly put that statute: to detain and investigate suspects whom the government lacked probable cause to charge with a crime. That distinction is made evident by the laws of foreign nations, as well as those of this country.

A number of foreign nations, including ones that share our values and legal traditions, have grappled with national security concerns similar to those in the United States, and have enacted laws that permit their citizens to be detained while authorities conduct an investigation against them. Some of those countries also have laws similar to Section 3144. Notably, foreign legislative schemes that permit preventative or investigative detention are distinct from those authorizing the detention of witnesses. They typically include procedural safeguards, and reflect a conscious and calibrated decision by lawmakers to provide explicit investigative detention authority to law enforcement.

In enacting Section 3144, Congress has authorized the detention of witnesses. Congress has also authorized the preventative detention of non-citizens on an exceedingly limited basis. But Congress has not authorized the preventative detention of U.S. citizens.

ARGUMENT

Respondent Abdullah al-Kidd is a U.S. citizen who was arrested in March 2003 under 18 U.S.C. §

3144. That statute authorizes the detention of a witness to a crime to compel his testimony under certain narrow circumstances when his testimony might otherwise be unavailable. The statute provides that a person may be detained if his testimony "is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144.

Petitioner allegedly instituted a policy of detaining individuals, including U.S. citizens like respondent, under Section 3144 without the requisite Congressional authorization or evidentiary showing. Specifically, petitioner allegedly ordered the U.S. Department of Justice to employ Section 3144 as a pretext to hold suspects against whom probable cause for an arrest was lacking, while an investigation could be undertaken against them. Respondent contends that Section 3144 was not intended to confer such authority on petitioner.

I. Foreign Nations Use Separate Laws to Detain Suspects and Witnesses.

Several foreign countries, including those that share our common law heritage, have enacted statutes authorizing detention for preventative or intelligence-gathering purposes in instances involving terrorism or other threats to their national security.[2] Some of these countries also authorize the

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[2] This Court has previously considered foreign legal practice in interpreting U.S. Constitutional rights in analogous situations. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("It does not lessen our fidelity to the Constitution or our

(Continued ...)

detention of material witnesses. But these laws are separate. And in countries with preventative or investigative detention provisions, there was a conscious decision by foreign legislatures to grant law enforcement such extraordinary authority, which

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pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."); *Washington v. Glucksberg*, 521 U.S. 702, 710-11 & n.8, 718 n.16 (1997) (Rehnquist, C.J.) (discussing centuries of "the Anglo-American common-law tradition" regarding punishment for assisting suicide and noting the practices of foreign states); *see also* The Federalist No. 63, at 382 (Alexander Hamilton or James Madison) (Clinton Rossiter ed., 1961) ("[A]ttention to the judgment of other nations is important to every government . . . [:] in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."). That is particularly true in the criminal law context, including the Fourth Amendment. *See, e.g.*, *Roper*, 543 U.S. at 576-78 (acknowledging foreign legal regimes' rejection of death penalty punishments for crimes committed by juveniles); *Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010) (assessing foreign practices with respect to juveniles convicted of non-homicide crimes); *Miranda v. Arizona*, 384 U.S. 436, 488-89 (1966) (assessing experiences of foreign states in requiring warnings to suspects during custodial interrogations); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (noting that protection from "arbitrary intrusion by the police" is "at the core of the Fourth Amendment" and that allowing such intrusion would be "inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples"), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 645-46 (1961).

typically is accompanied by extensive procedural safeguards.

A. Several Foreign Countries Have Separate Schemes for Witness Detention and Preventative and/or Investigative Detention.

Several foreign countries, including ones that share our common law heritage, have legal regimes that provide separately for witness detention and detention for preventative and/or investigative purposes, maintaining the clear distinction between detention schemes that petitioner allegedly blurred.

1. The United Kingdom

The United Kingdom, like the U.S., permits the detention of witnesses. It has a separate legal process for detaining terrorism suspects, however. That distinction is strictly maintained.

A summons may be issued for a material witness if a magistrate or clerk is satisfied that the person is both likely to give material evidence and will not attend voluntarily. Magistrates' Courts Act, 1980, c. 43, § 97. Applications for a summons under Section 97 have been denied, however, when the court has found the summons was not for "the simple and proper purpose of obtaining evidence, but for a different and ulterior purpose." *R v. Marylebone Magistrates ex parte Gatting and Emburey*, (1990) 154 JP 549 (quoting *R v. Baines and Anor*, (1909) 1 KB 258). In *Marylebone*, for instance, the court rejected a request for a summons to a witness the party claimed was material. The court noted its "suspicion in this case that the process of this court

is being abused," since the anticipated testimony of the witness would be hostile—not helpful—to the party requesting the summons. *Marylebone*, 154 JP 549.

In contrast to detention of witnesses under Section 97, terrorism-related detentions are authorized under a separate law, the Terrorism Act 2000, c. 11. Under that law, a constable may arrest without a warrant a person reasonably suspected of having been "concerned in the commission, preparation or instigation of acts of terrorism" or of committing enumerated terrorism offenses. *Id.* §§ 40, 41.[3] The U.K. thus has authorized the constable to detain individuals suspected of terrorism where the suspicion is reasonably based, while providing

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[3] The Terrorism Act is imbued with significant procedural protections. First, as soon as possible after arrest—and at 12-hour intervals for the first 48 hours, *id.* § 41 & sched. 8 ¶21—the detention must be reviewed by a police officer not directly involved in the investigation; the detention may be continued only if the reviewing officer finds that, *inter alia*, the detention is necessary to obtain or preserve relevant evidence, or to make a decision about the deportation or charging of the suspect. *Id.* sched. 8 ¶¶ 23-24. After 48 hours, the detention must be supported by a judicial finding that (1) the detention is necessary, *inter alia*, to obtain or preserve relevant evidence; and (2) the investigation is being conducted diligently and expeditiously. *Id.* sched. 8 ¶ 32. Such pre-trial detention is renewable for supplemental periods of seven days, up to a maximum of 28 days. *Id.* sched. 8 ¶ 36. Since 2006, the Act has permitted continued detention to question the suspect, as well as to complete "examination or analysis of any relevant evidence." *Id.* sched. 8 ¶ 32. In any case, after 28 days, the suspect must be charged or released. *Id.* sched. 8 ¶ 36.

separate authority for witness detention, so long as such detention is not effected for an "ulterior purpose."

2. Canada

Like the United Kingdom, Canada's legislative scheme separately authorizes detention of witnesses and detention for purposes related to terrorism. Akin to Section 3144, Canada permits the detention of a witness "bound by recognizance to give evidence in any proceedings." Criminal Code, R.S.C., c. C-46, § 704(1) (1985); *see also id.* § 706 ("Where a person is brought before a court . . . under a warrant issued pursuant to subsection 698(2) or section 704 or 705, the court . . . may order that the person . . . be detained in custody").

In the wake of September 11, 2001, Canada authorized two other types of detention: "Investigative Hearings" and "Recognizance with Conditions," the authority for which sunset in 2007.[4] Anti-Terrorism Act, S.C., c. 41 (2001); *see also* Criminal Code, c. C-46, §§ 83.28-83.3. Investigative Hearings allowed investigators to seek an order requiring a witness believed to have information concerning a terrorism offense to appear before a judge to answer questions. Criminal Code, R.S.C., c. C-46, § 83.28(5). Witnesses to a terrorism offense in an Investigative Hearing could be arrested and detained in custody for several reasons, including the

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[4] *See* Criminal Code, R.S.C., c. C-46, § 83.32 (1985). The government tabled a 2010 bill for their reenactment. *See* Bill C-17.

risk of flight. *Id.* § 83.29(1).[5] The law also expressly permitted preventative detention. *Id.* § 83.3. A person could be arrested when an officer reasonably believed that terrorist activity would be carried out or reasonably suspected that the imposition of a recognizance with conditions or the arrest of a person was necessary to prevent terrorist activity.[6]

In a notable decision, the Supreme Court of Canada made clear that the procedures under these anti-terrorism laws may not be used to circumvent normal criminal protections. *See Re: Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 ¶ 72 ("There is no reason to believe that the predominant purpose of the judicial investigative hearing before us is to obtain information or evidence for the prosecution of the appellant."). *Application under S. 83.*28 arose out of prosecutions associated with the bombing of an airplane. The state sought an application to compel a witness to participate in a "judicial investigative hearing" under Canada's Anti-

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[5] Witnesses to the Investigative Hearings were not allowed the privilege against self-incrimination, but were given use and derivative use immunity for their testimony as a check against using Investigative Hearings to secure incriminating evidence against the witness. *Id.* § 83.28(10).

[6] After arrest—and after obtaining the consent of the relevant Attorney General—the detainee had to be brought before a provincial court judge within 24 hours (or "as soon as possible" if the judge is not available) for review of the detention and for determining whether recognizance with conditions (such as having no contact with certain other persons) is appropriate. *Id.* § 83.3(6).

Terrorism Law. The Court explicitly recognized the particular need for caution when addressing the scope and application of such laws:

> It was suggested in submissions that the purpose of the Act should be regarded broadly as the protection of "national security." However, we believe that this characterization has the potential to go too far and would have implications that far outstrip legislative intent. The discussions surrounding the legislation, and the legislative language itself clearly demonstrate that the Act purports to provide means by which terrorism may be prosecuted and prevented. . . . [C]ourts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere . . . , we must not lose sight of the particular aims of the legislation. Notably, the Canadian government opted to enact specific criminal law and procedure legislation and did not make use of exceptional powers, for example under the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), or invoke the notwithstanding clause at s. 33 of the *Charter*.

Id. ¶ 39; *see also Re Vancouver Sun*, [2004] 2 S.C.R. 324 (companion case concluding that investigative hearings presumptively were to be held in open court). The Court then upheld the request for the application regarding the witness, noting the good faith of the prosecution in seeking the application for investigative purposes related to the witness, as opposed to any "oblique motive or otherwise improper purpose." *Application under s. 83.28 of the Criminal Code* [2004] 2 S.C.R. 248 at 97. The Court also remarked that where "the Crown can be shown to have acted vexatiously or in bad faith, recourse may be sought through the courts." *Id.* at 95. Accordingly, like the U.K., Canada maintained distinct procedures for material witness detention and investigative or preventative detention, and sought to ensure that its legal processes are not employed with ulterior motives.

3. South Africa

South Africa, a former British colony, also has enacted separate laws for witness detention and terrorism-related preventative and investigative detentions. Its Criminal Procedure Act 51 of 1977 sets out the terms under which the state may detain "ordinary" (*i.e.*, non-security related) witnesses, much in the manner of Section 3144. *See id.* § 185.[7]

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[7] To effectuate a witness detention, the attorney general must submit an affidavit to a court for review and decision. *See id.* §§ (1)-(2). The detainee can generally be held inaccessible until the underlying criminal proceedings are concluded, but

(Continued ...)

South Africa's Internal Security Act 74 of 1982 (ISA), on the other hand, provides for both preventative and investigative detention of witnesses and suspects who raise national security concerns. *See id.* § 28 (regarding "[d]etention of certain persons in order to prevent commission of certain offences or endangering of security of State or of maintenance of law and order"); § 29 (regarding "[d]etention of certain persons for interrogation"); *see also Minister of Law and Order v. Hurley* 1986 (3) SA 568 (A). The ISA also dictates specific showings and procedures for each.[8] Thus, comparable to the U.K. and Canada, South Africa has enacted separate legal structures for material witness detentions and preventative or investigative detentions.

4. Australia

Australia, which also shares a legal heritage with the U.K., enforces a strict boundary between detention for the purpose of gathering evidence and preventative detention of terrorism suspects. For witnesses, a "questioning and detention warrant" is

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the Act also provides for regular visitation by a local magistrate. *See id.* § (4)-(6).

[8] For § 28 preventative detention, the government must provide the detainee with a statement setting forth the reasons of detention, to which the detainee may respond with the assistance of counsel. *See id.* §§ (3)(b), (8)-(9). For § 29 investigative detention, regular reports justifying continued detention must be made to the Minister of Law and Order and a showing made to a review board, whom the detainee may petition for release. *See id.* §§ (2)-(4). The detainee must also be visited regularly by a magistrate and a doctor. *See id.* § (9).

available for persons of intelligence value for up to 168 hours (seven days). *See* Australian Security Intelligence Organisation Act 1979 (Cth), pt III; div 3; ss 34F-H, 34R-S (Austl.).[9]

In contrast, terrorism suspects can be detained preventatively under a different type of warrant for twice as long. *See* Anti-Terrorism Act (No. 2) 2005 (Cth) sch 4 (Austl.); Criminal Code Act 1995 (Cth) ch 2, pt 5.3, div 105 (Austl.); Terrorism (Police Powers) Act 115 of 2002 (NSW). Significantly, Australia's Criminal Code prohibits the questioning of a suspect detained preventatively under the Anti-Terrorism Act. *See* Criminal Code Act 1995 (Cth) ch 2, pt 5.3, s 105.42 (Austl.). Australia thus criminalizes what petitioner is alleged to have done here: use of one kind of detention to accomplish the purpose of another.

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[9] Under this procedure, the officer "must make arrangements for the person to be immediately brought before a prescribed authority for questioning." *Id.* § 34H. A person may not be detained for "a continuous period of more than 168 hours." *Id.* § 34S. After 168 hours have passed, an officer may obtain additional questioning and detention warrants only if the issuing authority finds that (i) a new warrant is justified by information additional to or materially different from that known to the Director-General when the Director-General sought the Minister's consent to request the issuance of the last of the earlier warrants; and (ii) the person is not being detained under this Division in connection with one of the earlier warrants. *Id.* § 34G.

5. Germany

Germany also has enacted separate laws for witness detention and preventative detention. Under Section 70 of the German Criminal Procedure Code, akin to Section 3144, witnesses can be placed in "coercive detention" until the termination of the legal proceedings to compel their testimony. *Strafprozeßordnung* [StPO] [Code of Criminal Procedure], Apr. 7, 1987, *Bundesgesetzblatt* [BGB_L] 312-2, § 70 (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.htm. Sections 413-416 of the Criminal Procedure Code set forth a separate scheme of preventative detention, applicable where the prosecutor "does not conduct criminal proceedings because of the perpetrator's lack of criminal responsibility or his unfitness to stand trial." *Id.* § 413.[10]

The German federal states have also enacted laws permitting the detention of suspects for public safety reasons, whether or not formal criminal investigations are pending. *See, e.g.*, *Wortlaut des Hessischen Gesetzes über die öffentliche Sicherheit und Ordnung* [HSOG] [Hessian Public Security and Order Law], Dec. 22, 2004, as amended Jan. 15, 2005 [GVB_L]. § 32(1) (Ger. (Hes.)).

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[10] The preventative detention procedure is similar to the criminal procedure, except the Public prosecutor must make a written application (rather than an indictment). *Id.* § 414. An expert then prepares an opinion and the court conducts an examination. *Id.* §§ 414-15. If the accused criminal responsibility becomes apparent through these proceedings, they may transition to criminal proceedings. *Id.* § 416.

B. Other Foreign Countries Have Authorized Preventative and Investigative Detention With Extensive Procedural Safeguards.

Still other countries, which do not appear to have laws similar to Section 3144, have enacted laws permitting detention for preventative and investigative purposes. These detention schemes show the due consideration their legislatures have given the confinement of citizens and the extensive procedural safeguards they have imposed before a witness may be lawfully detained.

1. Israel

Since anti-terrorism is a fundamental component of its security efforts, Israel has carefully constructed detention laws. Israel authorizes preventative detention of suspected terrorists as part of a scheme of "administrative detention," distinct from criminal detention. Section 2(a) of the Emergency Powers (Detention) Law, 5739-1979 (EPDL) allows law enforcement officials to detain administratively both citizens and non-citizens when the Minister of Defense has "reasonable cause to believe that reasons of state security or public security" require it.

Broad though that authority may be, it is not unlimited, and a detention order may be vacated if it is found to have been made in "bad faith" or based on "irrelevant considerations."[11] For example, Israel's

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[11] Generally within 48 hours of arrest, detainees must appear before a judge, who views all the evidence (including

(Continued ...)

Supreme Court has concluded that the EPDL does not allow Israel to detain as "bargaining chips" individuals who do not themselves pose a terrorism risk but are held as a negotiating tool for the release of Israeli soldiers. *See* CrimA 7048/97 *Anonymous Persons v. Minister of Defense,* 54(1) P.D. 721 (2000). In response to that ruling, the Knesset enacted the Incarceration of Unlawful Combatants Law, 5762-2002 (IUCL), under which the state may detain "member[s] of a force perpetrating hostile acts against the state of Israel." IUCL, §§ 2, 3(a).

2. India

In a similar vein, India authorizes the central government to detain preventatively persons without trial in matters related to foreign affairs, defense, or security. India Const., art. 22(5). India also provides for preventative detention outside the emergency context by explicitly empowering Parliament to enact preventative detention laws for reasons connected with "the security of the State," "maintenance of

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classified evidence) before deciding what to disclose to the detainee and/or the detainee's counsel. The district court reviewing a detention order must vacate the order if the court does not find "objective reasons of state security or public security" requiring the detention, or if the detention was "made in bad faith or from irrelevant considerations." EPDL § 4(c). The detainee can appeal the district court's decision directly to Israel's Supreme Court. To uphold the order the court must find that (1) the danger to the state was "so grave as to leave no choice but to hold the suspect in administrative detention," or that (2) the detainee "would almost certainly pose a danger to public or state security." *See Agbariyya v. State of Israel,* 42(1) P.D. 840, 844-45 (Heb.).

Public order," or "maintenance of supplies and services essential to the community." National Security Act N.65 of 1980 (NSA), § 3(2); *see also* India Const., art. 22(3)-(7).

Laws enacted pursuant to these constitutional authorities, permitting preventative detention, have been upheld by Indian courts. *See A.K. Gopalan v. State of Madras*, A.I.R. (1950) S.C. 27. For instance, the NSA allows the central government or any state government to order the detention of an individual for up to twelve months (*id.* § 13) to prevent him or her from acting in a manner "prejudicial to the [defense] of India, the relations of India with foreign powers, or the security of India." *Id.* § 3(1)-(2). Once again, though, such authority is cabined by procedural protections, ending detentions, like respondent's, where the justification for detention is "non-existent."[12]

3. Singapore and Malaysia

Similarly to India, the constitutions of both Singapore and Malaysia authorize preventative detention. Federal Const. of Malaysia, Art. 149(1); Singapore Const., Art. 149(1). Both countries have

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[12] *See, e.g., Smt. Devi v. State of Manipur and Ors*, (2010) 9 S.C.C. 618 ¶¶ 22-23 (finding that if the grounds for justifying the detention are "non-existent or misconceived or irrelevant," the detention violates the detainee's right to be fully informed of the grounds for his detention and to make a representation against his detention at the earliest opportunity); *see also id.* ¶¶ 20, 23 ("[T]here must be a reasonable basis for the detention order, and there must be material to support the same.").

enacted identical internal security acts governing the terms of preventative detention.[13] Both laws give the Minister the power to detain a person on the precondition that the Minister or President is "satisfied" that it is necessary to do so, "with a view to preventing [the person] from acting in any manner prejudicial to the security of [the State]." Malaysia Internal Security Act 1960, § 8(1) (2006); Singapore Internal Security Act, § 8(1).

* * *

As these legal regimes show, many foreign countries have, after due consideration, enacted preventative and investigative detention schemes, accompanied by explicit procedural safeguards. Some also have enacted material witness laws in the vein of Section 3144, but have not allowed law enforcement to use these statutes for investigating suspects. Rather, these countries have expressly granted law enforcement officials the authority that petitioner did not have under the clear language of Section 3144: to detain individuals for preventative or investigative purposes relating to terrorism.

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[13] Preventative detention law in Singapore owes its origins to the preventative detention law of Malaysia, which became Singapore law when Singapore joined the Federation of Malaya in 1963. Singapore left the Federation in 1965, but substantially the same preventative detention laws continue in force in both countries.

II. al-Kidd's Detention was Outside the Authority that Congress Granted Petitioner.

The actions of these foreign countries, permitting the detention of individuals for national security reasons, stands in sharp contrast to the decisions made by the U.S. Congress. As a matter of U.S. law, any federal detention of U.S. citizens must be authorized by an act of Congress, and the Executive Branch must make an appropriate showing of cause; and any state detention scheme must also be based on such a showing. Non-Detention Act, 18 U.S.C. § 4001(a); *see, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (plurality opinion) (because "due process demands some system for a citizen-detainee to refute his classification [of enemy combatant], the proposed 'some evidence' standard is inadequate"); *United States v. Salerno*, 481 U.S. 739, 751-52 (1987) (upholding pretrial detention based on "clear and convincing" showing of future dangerousness); *Addington v. Texas*, 441 U.S. 418, 431-32 (1979) (upholding civil commitment of mentally ill on showing of danger to the public); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."); *Ex parte Endo*, 323 U.S. 283, 297, 303 (1944) (limiting the War Relocation Authority's power to detain a "concededly loyal" citizens because the "authority to detain a citizen. . . is exhausted . . . when his loyalty is conceded.").

A. Congress Authorized Limited Preventative Detention of Aliens in the Aftermath of September 11, 2001.

Congress has expressly authorized the limited preventative detention of aliens under federal immigration laws. After September 11, 2001, Congress enacted legislation authorizing the Attorney General to detain an alien for up to seven days "until the alien is removed from the United States" if the Attorney General has "reasonable grounds to believe" that an alien is engaged in terrorist activity or any other activity endangering national security. USA Patriot Act, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 350-51 (enacted Oct. 26, 2001) (codified at 8 U.S.C. §§ 1226a(a), (a)(5) (2000 ed., Supp. II)).

Congress could have attempted, consistent with the U.S. Constitution—and reflective of the approaches taken by other countries—to enact a similar statute authorizing detention of U.S. citizens. It did not do so.

B. Congress Did Not Authorize the Preventative Detention of U.S. Citizens in the Aftermath of September 11, 2001.

In fact, Congress has expressly repealed a legislative scheme similar to those enacted in other countries, which authorized the preventative and investigative detention of U.S. citizens for certain national security reasons. Sixty years ago, at the onset of the Cold War, Congress enacted the Emergency Detention Act of 1950. The law authorized detention of a citizen when "there is reasonable ground to believe that such person

probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage" when there is an "internal security emergency." Emergency Detention Act of 1950, 50 U.S.C. §§ 812-813 (1970 ed.). The Emergency Detention Act was repealed in 1971 when Congress passed the Non-Detention Act, which prohibits detention of United States citizens unless authorized by an act of Congress. *See* Pub. L. No. 92-128, 85 Stat. 347, 347-48 (Sept. 25, 1971); 18 U.S.C. § 4001(c); Non-Detention Act, 18 U.S.C. § 4001(a); *see also Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (noting that Section 4001(a) prohibits "detention *of any kind* by the United States, absent a congressional grant of authority to detain") (emphasis in original). At no time after September 11, 2001, has Congress enacted a law similar to the Emergency Detention Act, which permitted U.S. citizens to be detained in the civilian justice system while a criminal investigation against them was conducted.

The failure to enact such legislation stands in notable contrast to Congressional action in the context of military affairs. On September 18, 2001, the President signed the Authorization for Use of Military Force (AUMF), which generally permitted the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the September 11, 2001 attacks. 115 Stat. 224. A plurality of this Court found that the AUMF authorized detention of a U.S. citizen who was captured in a foreign combat zone and designated as an enemy combatant because under these "narrow circumstances," a citizen may be

detained "to prevent a combatant's return to the battlefield." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (O'Connor, J.).[14] More importantly, as a plurality of the Court concluded, the AUMF would only authorize the detention of a U.S. citizen who is properly designated as an enemy combatant. *See id.*

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Congress thus has recently enacted laws that permit the detention of aliens, and in the past had enacted laws permitting the detention of U.S. citizens for national security, terrorism, and other considerations. That Congress did not enact such legislation in the wake of September 11, 2001, permitting citizen-suspects to be detained by the Department of Justice while a criminal investigation

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[14] Two bills were proposed that would have authorized detention of U.S. citizens designated as "unprivileged enemy belligerents," but neither was enacted. *See* Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. (Mar. 4, 2010) (introduced by Sen. McCain, among others) ("An individual, including a citizen of the United States, determined to be an unprivileged enemy belligerent . . . may be detained without criminal charges and without trial for the duration of hostilities against the United States . . . ."); *see also* Terrorist Detention Review Reform Act, S. 3707, 111th Cong. (Aug. 4, 2010) (introduced by Sen. Graham) ("Congress reaffirms that the President is authorized to detain unprivileged enemy belligerents in connection with the continuing armed conflict with the Taliban, al Qaeda, and associated forces, regardless of the place of capture, until the termination of hostilities.").

is conducted against them, cannot be deemed accidental.

Congress's chosen approach also stands in marked contrast to the considered determinations made by other countries facing similar national security and terrorism concerns. These countries expressly have provided law enforcement with the very authority petitioner unilaterally sought to exercise here: preventative detention schemes to investigate national security threats. Congress's failure to provide petitioner with such authority strongly supports respondent's contention that the policy petitioner employed extended beyond the permissible scope of Section 3144.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 28, 2011

AMICUS CURIAE BRIEF

No. 10-98

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The Constitution Project (Project) is an independent, bipartisan organization that promotes

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus* certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to the brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. After September 11, 2001, the Project created its Liberty and Security Committee, a blue-ribbon commission of prominent Americans, to address the importance of preserving civil liberties as we work to protect our Nation from international terrorism. In all its work, the committee emphasizes the need for all three branches of government to play a role in preserving constitutional rights. And the Project has regularly appeared before this Court in cases raising important questions of separation of powers. *See, e.g.*, *Boumediene* v. *Bush*, 553 U.S. 723 (2008); *Munaf* v. *Geren*, 553 U.S. 674 (2008).

The Project's Liberty and Security Committee has issued a series of reports addressing the issues currently before this Court. In July 2004, the committee issued a *Report on Post-9/11 Detentions*, in which its signatories urged that "[a]ny detention of a citizen or non-citizen in the United States must be expressly authorized by congressional statute or by the law of war."[2] In 2008, the committee issued *A Critique of National Security Courts*, analyzing the Government's use of preventive detention. The report recommended that all prosecutions for terrorism be handled by Article III courts and explained that preventive detention is only constitutionally permissible in very narrow

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[2] Liberty & Security Committee, The Constitution Project, *Report on Post-9/11 Detentions* 20 (2004). The report and the attached signatories are available at http://www.constitutionproject.org/pdf/report_on_post_9_11_detentions.pdf.

circumstances.[3] Also in 2008, the committee published a report on the Government's use of immigration policy as a counterterrorism tool, including the limited detention of aliens authorized in Section 412 of the USA Patriot Act. The report's signatories recommended that this section's limited detention authority be repealed.[4]

The Project files this brief in support of Respondent to address the important question of the scope of the Executive's detention authority.

SUMMARY OF ARGUMENT

Executive authority is not unlimited. "[It] must stem either from an act of Congress or from the Constitution itself." *Medellin* v. *Texas*, 552 U.S. 491, 524 (2008) (internal quotations omitted). Yet the Executive action at issue in this case—the preventive detention of U.S. citizens and other persons lawfully within the United States—has never been approved by Congress. Just the opposite. Congress *denied* the Attorney General precisely the preventive detention power that he sought over aliens, and the Executive has never purported to ask for it with regard to American citizens.

In the immediate aftermath of the September 11, 2001 terrorist attacks, the Justice Department requested from Congress the authority to

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[3] Liberty & Security Committee, The Constitution Project, *A Critique of National Security Courts* (2008), *available at* http://www.constitutionproject.org/pdf/144.pdf.

[4] Liberty & Security Committee, The Constitution Project, *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations* 8, 12 (2008), *available at* http://www.constitutionproject.org/pdf/48.pdf.

preventively detain aliens suspected of involvement with terrorism. *See* Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001). Over the course of a month's deliberations, including committee hearings and floor debate, Congress considered the Department's unbounded request—and rejected it. Instead, Congress crafted an alternative detention policy that authorized the Executive to detain certain aliens suspected of terrorism only briefly, for seven days. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 351 (2001) ("USA Patriot Act" or "Patriot Act"). To continue the detention longer, Congress required the Attorney General to charge the non-citizen with a crime or initiate deportation. *See id.* If the Attorney General did neither, the alien had to be released. *See id.* Further, Congress subjected the Attorney General's detention decision to judicial review, required the Attorney General to provide updates on any alien detained longer than a week, and barred the Attorney General from delegating the decision to detain to any subordinate other than the Deputy Attorney General. *See id.* In short, Congress completely redrafted the detention provisions the Executive proposed, and in so doing, expressed its will on detention policy. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (when Congress "has not left * * * an open field," but has crafted its own policy on a given matter, it cannot be said to have acquiesced in the Executive's action).

But the power that Congress denied expressly is the very same power that the Executive now claims indirectly through the material witness statute.

That is not how the separation of powers works. Under Justice Jackson's famous *Youngstown* framework, the fact that Congress carefully considered—and rejected—proposals that would have granted the Executive the authority it now claims means that the exercise of this authority can be justified only by the Executive's inherent "constitutional powers *minus* any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added). That is a thin reed on which to rest the capacious powers the Department of Justice has exercised here. This Court has never held that the Executive has inherent Article II power to detain individuals as part of the war on terrorism. The cases this Court has heard that implicated the Executive's authority to detain individuals suspected of terrorism all involved authority granted by Congress. *See, e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Boumediene* v. *Bush*, 553 U.S. 723 (2008). The Executive's attempt to circumvent the clearly expressed will of Congress—that open-ended preventive detention is not permissible—threatens the equilibrium of the constitutional order. *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) (category three Executive claims "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

ARGUMENT

THE EXECUTIVE'S USE OF THE MATERIAL WITNESS STATUTE TO PREVENTIVELY DETAIN U.S. CITIZENS AND OTHER PERSONS LAWFULLY WITHIN THE UNITED STATES RAISES SERIOUS SEPARATION-OF-POWERS CONCERNS.

To evaluate exercises of Executive power, this Court has long referred to the tripartite framework elaborated by Justice Jackson in *Youngstown Sheet & Tube Company*. *See, e.g., Medellin*, 552 U.S. at 524 (citing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action * * * ."). According to that framework, "when the [Executive] acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." *Youngstown*, 343 U.S. at 635. "When the [Executive] acts in absence of either a congressional grant or denial of authority," however, only Article II's "independent powers" will justify the action, leading to a "zone of twilight in which [the Executive] and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Finally, "[w]hen the [Executive] takes measures incompatible with the expressed or implied will of Congress, [its] power is at its lowest ebb," and valid only if Congress is itself not permitted to "ac[t] upon the subject." *Id.* at 637-638.

This case falls in category three. The Justice Department has adopted a policy of preventive detention directly at odds with the detention authority Congress authorized. The Executive's

policy thus threatens to upset the separation of powers and should not be permitted to stand.

A. Congress Has Refused To Authorize Open-Ended Detention Of U.S. Citizens Or Other Persons Lawfully Within The United States.

1. No act of Congress permits the policy of preventive detention that the Department of Justice implemented in the aftermath of September 11, 2001. As Respondent al-Kidd explains in his brief, the material witness statute was never intended to authorize this sort of detention, and the Executive's use of the statute for that purpose violates its plain terms. *See* Respondent's Br. 24-31. Moreover, neither the Authorization for Use of Military Force, 115 Stat. 224 (2001) (AUMF), nor the Detainee Treatment Act of 2005, 119 Stat. 2680 (2005) (DTA), permits the preventive detention of non-combatants lawfully within the United States. Indeed, neither statute so much as mentions civilian detention.

But the most fundamental problem with the Department's policy is not that Congress has never authorized the power that the Executive claims. Rather, it is that Congress expressly rejected legislation that would have given the Executive just that power. To be sure, Congress did bestow upon the Executive some authority to detain non-citizens suspected of involvement with terrorism. That authority is contained in Section 412 of the USA Patriot Act. *See* 115 Stat. 272, 351 (2001). But the detention authority Congress drafted in Section 412 is fundamentally different from the policy pursued by the Executive in this case. Indeed, the Patriot Act's text and drafting history reveal that Congress affirmatively *rejected* the Executive's detention

policy, fashioning its own more modest policy as a substitute.

2. Because that drafting history is so extensive—and so instructive on just what Congress did, and did not, authorize—it merits careful scrutiny. There is nothing surprising about that approach. This Court has recently examined drafting history to resolve various separation-of-powers questions. *See Medellin*, 552 U.S. at 504-516 (investigating drafting history of Optional Protocol to Vienna Convention on Consular Relations to determine whether Congress meant Protocol to be self-executing); *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 593-595 (2006) (examining drafting history of AUMF and DTA to determine whether Congress intended to amend Uniform Code of Military Justice). And the Court has often looked to an instrument's drafting history to discern Congress's views in a given area, whether the question is the meaning of a particular treaty, *see, e.g.*, *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (interpreting treaty provisions), or a complex statutory scheme, *see, e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 133-135 (2008) (looking to drafting history of Controlled Substances Act to discern meaning of "felony drug offense"); *Bank One Chicago, N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (interpreting Expedited Funds Availability Act); *see also Harbison* v. *Bell*, 129 S. Ct. 1481, 1489-90 (2009) (interpreting AEDPA).

Here, the Patriot Act's drafting history is particularly relevant. Between the time the Justice Department first proposed new antiterrorism measures in mid-September 2001 until the time Congress adopted the Patriot Act little more than a month later, Congress considered and rejected

precisely the policy of preventive detention the Executive has pursued. Indeed, with the Patriot Act, Congress crafted a wholly alternative and much more limited detention authority for use in combating terrorism. Justice Jackson instructed in *Youngstown* that when Congress "has not left * * * an open field," but has crafted its own policy on a given matter, it cannot be said to have acquiesced in the Executive's action. 343 U.S. at 639 (Jackson, J., concurring); *see also Medellin*, 552 U.S. at 528-529. Just so here.

3.a. In the fall of 2001, the Justice Department proposed a series of antiterrorism measures in response to the September 11 attacks. The Justice Department called its proposal "The Anti-Terrorism Act of 2001." Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001). Several of its sections proposed a greatly expanded power of Executive detention.

In particular, Section 202 of the proposed Act would have authorized indefinite preventive detention, without charge, of aliens suspected of some connection to terrorist activities or groups. That section would have provided:

> (e) Detention of Terrorist Aliens. –
>
> (1) Custody. – The Attorney General shall take into custody any alien who is certified under paragraph (3).
>
> (2) Release. – The Attorney General shall maintain custody of any such alien until such alien is removed from the United States. Such custody shall be maintained irrespective of any relief from removal the alien may be eligible for or granted until the

> Attorney General deems such alien is no longer an alien who may be certified pursuant to paragraph (3).
>
> (3) Certification. – The Attorney General may certify an alien to be an alien he has reason to believe may commit, further, or facilitate acts [of terrorism] described in section 237(a)(4)(A)(i), (A)(iii), or (B), or engage in any other activity that endangers the national security of the United States.

Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001).

Section 203 of the proposed Act sought to prohibit judicial or administrative review of any detention apart from habeas corpus, and to limit habeas review to the U.S. District Court for the District of Columbia. *Id.* § 203. Section 204 meanwhile would have applied the detention authority spelled out in the two previous sections "to all aliens, regardless of whether any such aliens entered the United States before or after the date of enactment," and regardless of whether "any relevant activity by any such aliens occurred before or after such date." *Id.* § 204.

b. Almost immediately, members of Congress from both parties voiced opposition to the detention proposals. At a Senate Judiciary Committee hearing on the antiterrorism measures, Senator Edward Kennedy noted that "many of us * * * have serious concerns about the administration's proposal to give the Government broad powers to detain a person indefinitely on the mere suspicion that the person may engage in terrorist activity without any realistic review of the decision." *Homeland Defense: Hearing Before the S. Committee on the Judiciary*, 107 Cong.

18 (2001). At the same hearing, Senator Arlen Specter similarly objected to "th[e] very generalized standard" for detention proposed by the Department, which in his view lacked "any evidentiary base or probable cause." *Id.* at 26. Senator Russ Feingold, too, objected to the detention provisions at the hearing, saying that "indefinite mandatory detention * * * raise[s] serious due process concerns." *Id.* at 28 (statement of Sen. Feingold).

In the House, members of the Judiciary Committee voiced similar, bipartisan opposition. Congressmen Bob Barr, Bobby Scott, Chris Cannon, Darrell Issa, and Jeff Flake—four Republicans and a Democrat—issued a joint report on the Department's antiterrorism proposals in which they called the detention provisions "fundamentally flawed" and "unacceptable." *See* Letter to Chairman Sensenbrenner & Ranking Member Conyers (Sept. 19, 2001) (cited in *Hearing Before the Committee on the Judiciary, House of Representatives* at 50 (Sept 24, 2001) (statement of Rep. Barr)). Sections 201, 202, 203, and 204 of the Justice Department's proposal, they wrote, "permit the immediate detention of non-citizens based on a vague 'reason to believe' that the person is a 'threat to national security.' " *Id.* "In many cases," the report warned, "this detention could be indefinite." *Id.* Worse, it was not clear "what, if anything, would be subject to judicial review, and limiting judicial review to courts in the District of Columbia would effectively deny review to aliens in distant states." *Id.* They recommended the House Judiciary Committee scrap the detention provisions and start over.

4. In the weeks following, the Senate and House Judiciary Committees took precisely this course,

substantially redrafting the Department's proposals. When the overhauled antiterrorism bill eventually came to the floor for debate, it included detention provisions quite different from what the Department initially proposed.

The Senate bill was introduced on October 4, 2001. Senator Patrick Leahy, one of the bill's chief sponsors and Chairman of the Judiciary Committee, described the major changes the bill made to the Justice Department's detention proposals. First and foremost, the Senate bill refused to authorize open-ended detention. Instead, Senator Leahy explained, "the Justice Department must now charge an alien with an immigration or criminal violation *within seven days of taking custody*." 107 Cong. Rec. S10547, 10558 (daily ed. Oct. 11, 2001) (emphasis added). Second, "if an alien is found not to be removable, he must be released from custody." *Id.* And third, the Attorney General would not be permitted to delegate his detention authority to just any subordinate: Senator Leahy emphasized that "the Attorney General can only delegate the power to certify an alien to the Deputy Attorney General" or to the Immigration and Naturalization Service Commissioner, thereby "ensuring greater accountability and preventing the certification decision from being made by low-level officials." *Id.* Even with these changes, Senator Leahy continued to voice concern over the uses to which the detention power might be put, but reported that the new detention provision—rechristened Section 412 in the Senate bill—was much "improved." *Id.*

One of the bill's other chief sponsors, Senator Orrin Hatch, echoed his co-sponsor's assessment, emphasizing the broad new restrictions that the

Committee had added to the Department's proposal. Senator Hatch too stressed that "the alien must be charged with an immigration or criminal violation *within seven days*." *Id.* at 10561 (emphasis added). If the Attorney General did not bring charges within that time frame, the redrafted Section 412 required the Attorney General to "relinquish custody." *Id.* at 10603. In addition, Senator Hatch pointed out, "the [Attorney General's] certification itself is subject to judicial review." *Id.* at 10561.

The House version of the detention authority was even more circumscribed. At the House Judiciary Committee's markup session on October 3, 2001, members adopted a series of restrictions over and above those in the Senate bill. Congresswoman Sheila Jackson-Lee proposed revising the section covering habeas review of detention decisions to permit review in any federal district court. *See* H.R. Rep. No. 107-236, pt. 1, at 402-403 (2001). Congressman Jerrold Nadler and Congresswoman Jackson-Lee together proposed language that would compel the Attorney General to release within 90 days aliens detained as terrorists who had not been deported or who were unlikely to be deported in the "reasonably foreseeable future." *Id.* at 43-44. And Congressman Barr proposed to restrict the Attorney General's power to delegate the initial decision to detain even further; his amendment permitted delegation only to the Deputy Attorney General. *See id.* at 43. The Committee adopted all these amendments.

Thus the bill reported out of Committee and brought to the House floor on October 5, 2001, looked very different—in very fundamental ways—from the Justice Department's proposal. As the House

Committee Report explained, the bill permitted detention of an alien only if the Attorney General had "reasonable grounds to believe" the alien was engaged in terrorist activity or otherwise "endanger[ed] the national security of the United States"—not based on mere suspicion, as the original Justice Department draft proposed. *Id.* at 18. The bill required any detained alien to be charged within seven days, or released. *See id.* It restricted the certification decision to the Attorney General or the Deputy Attorney General alone. *See id.* It also permitted judicial review "of the merits of the [Attorney General's] determination" in any federal district court. *Id.* at 65. And it directed the Attorney General to release any alien found to be removable but not actually removed within 90 days, unless the Attorney General "demonstrate[d]" that the alien presented an ongoing threat to national security, a certification he was then required to renew every six months. *Id.* at 18.

5. In Conference, House and Senate negotiators reconciled the two detention provisions by adopting the House's more restricted version. The result was a final bill that, in the words of the Conference Report, "*completely revises the Administration's proposal* to better balance the law enforcement needs of the Attorney General with the protection of aliens' civil liberties." 107 Cong. Rec. H7159, 7198 (daily ed. Oct. 23, 2001) (emphasis added). That was no exaggeration. To demonstrate just how pronounced the changes were, the Report catalogued seven fundamental revisions to the Justice Department's original proposal. Among the most crucial were: curtailing the Attorney General's discretion to detain non-citizens, limiting the number of days an alien

could be held without charge, providing for the alien's release, and ensuring meaningful judicial review. *Id.* at 7198-99. The Report, in short, confirmed that Congress had refused to grant the Executive a broad license to engage in preventive detention without charge.

Multiple members of Congress pointed to these revisions when casting their final votes on the bill. Congressman James Sensenbrenner, chairman of the House Judiciary Committee, praised the new detention measures in part by noting that they denied the Attorney General the power to indefinitely detain non-citizens without charge. *See id.* at 7196. Congressman Conyers claimed the bill "corrected the immigration provision [as proposed by the Justice Department] that allows indefinite detention without evidence." *Id.* Congresswoman Zoe Lofgren emphasized that the Attorney General "may detain persons," but only upon "reasonable grounds" and only for limited amounts of time, all subject to court review. *Id.* at 7203. And Congressman Bill Delahunt noted that while the Justice Department's initial proposal "contain[ed] a number of profoundly disturbing features, including provisions that would have authorized the indefinite detention of nonresident aliens," the revised bill denied the Attorney General such open-ended authority. *Id.* at 7205.

Members of the Senate sang the same refrain. They emphasized that one of the principal reasons that the law deserved to be passed was that Congress had deprived the Executive of the radical power it had sought. Senator Leahy, for example, declared "that we have twice improved [the detention provision] from the original proposal offered by the

Administration," first by denying the Attorney General the power of unlimited detention, and second by subjecting all detention decisions to full habeas review. 107 Cong. Rec. S10990, at 11004 (daily ed. Oct. 25, 2001). Senator Feingold noted that while "the administration's original proposal would have granted the Attorney General extraordinary powers to detain immigrants indefinitely," the revised law denied the Executive this authority. *Id.* at 11022. Senator Jon Kyle called the detention authorized by the Patriot Act merely "temporary," based on a "bipartisan understanding" that "the Attorney General must charge an alien with a deportable violation or * * * release the alien." *Id.* at 11050. Finally, Senator Kennedy and Senator Sam Brownback introduced a joint report cautioning that even the "seven-day window to initiate proceedings is limited" and "should be used judiciously, with charges filed as promptly as possible." *Id.* at 11047. The bill was enacted on October 26, 2001.

6. This drafting history speaks with unmistakable clarity: Congress squarely rebuffed the Executive's request for unlimited detention power—over aliens *or* U.S. citizens. After all, while Section 412 and its drafting history make clear that the Executive may not detain non-citizens for more than seven days without charge, the Executive never so much as asked for such broad detention authority over American citizens. And neither the Justice Department's initial counterterrorism proposals, nor the AUMF, nor the DTA ever hinted at—let alone

expressly claimed—an authority to detain citizens for an extended period without charge.[5]

But Congress did not stop at merely rejecting the Executive's proposals. It responded to the Justice Department's request and the demands of national security by crafting an alternative and significantly more circumscribed detention authority. That authority, spelled out in Section 412 of the Patriot Act, was what Congress intended the Executive to use to combat the emergent terrorist threat—not a centuries-old statute drafted with no reference to present circumstances and for an entirely different purpose. Congress, in the words of Justice Jackson's *Youngstown* concurrence, "[did] not le[ave] * * * an open field," but clearly expressed its will regarding counterterrorism detention. 343 U.S. at 639 (Jackson, J., concurring).

B. The Executive's Use Of The Material Witness Statute To Implement Open-Ended Detention Is An Attempt To Circumvent The Will Of Congress.

Rather than use the tailored detention authority Congress crafted, the Executive has "cho[sen] a different and inconsistent way of its own." *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring). To the best of *amicus curiae*'s knowledge, in the years since Congress approved Section 412, the Executive has never invoked it—not

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[5] Whether Congress could grant the Executive such power consistent with the Constitution is an open question. *See Zadvydas* v. *Davis*, 533 U.S. 678, 679-680 (2001) ("Once an alien enters the country * * * the Due Process Clause applies * * *."); *see also Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). But that question is not before this Court and need not be answered here.

once. *See* Liberty & Security Committee, The Constitution Project, *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional Policy and Considerations* 6-8 (2008). Instead, the Executive has chosen a more expedient approach: to resort to the material witness statute to do what Congress refused to permit.

It is important to understand just how muscular an assertion of Executive power this truly is. The authority that Congress specifically granted the Executive in Section 412 requires the Government to file charges against, or begin deportation proceedings for, any alien detained under the statute *within seven days* of the detention—otherwise the Government must set the detainee free. *See* 115 Stat. 272, 351. The Government, though, has chosen not to heed those carefully crafted provisions and to resort instead to the material witness statute (as it has construed it). The Executive's interpretation of the material witness statute has allowed the Government to detain individuals for days and months on end without charge. *See also* 18 U.S.C. § 3144 (material witness statute).

But the problems run deeper still. Section 412 requires the Attorney General or Deputy Attorney General to certify that any individual detained has some connection to terrorist activities. *See* 115 Stat. 272, 351. Not so under the Government's interpretation of the material witness statute. Instead, *any* federal law enforcement officer may initiate detention simply by swearing out a perfunctory affidavit. *See* 18 U.S.C. § 3144. Section 412 does not authorize the detention of American citizens, *see id.*; the material witness statute—as read by the Government—effectively does, without

charge and without probable cause. The detention policy the Executive has adopted is, in short, not the one Congress authorized.

This Court has warned that when the Executive acts against the will of Congress, "[the] assertion of authority * * * [falls] within Justice Jackson's third category, not the first or even the second." *Medellin*, 552 U.S. at 527. This is dangerous territory. Executive claims "so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). Indeed, "[c]ourts can sustain [Executive action] in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-638.

This Court has *never* held that the Executive enjoys an independent—and immutable—power to detain civilians that is beyond Congress's reach. The Executive detention power at issue in *Hamdi*, 542 U.S. 507, and *Boumediene*, 553 U.S. 723, flowed from congressional statutes. As the Court put it in another context, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). The Executive does not have the power to detain civilians absent congressional authorization coupled with the most extraordinary of circumstances. "[O]ur history and tradition rebel at the thought that the grant of military power [in Article II] carries with it authority over civilian affairs." *Youngstown*, 343 U.S. at 632 (Douglas, J., concurring).

The Executive's policy of preventive detention directly contravenes the will of Congress and thus disturbs our constitutional equilibrium. This Court

has rejected such Executive intrusions in the past. In *Medellin*, the Court's investigation of the drafting history of the Optional Protocol to the Vienna Convention on Consular Relations convinced it that the Executive's actions to "enforce" a non-self-executing treaty in fact contravened the will of Congress. *See* 552 U.S. at 504-516. In *Hamdan*, the drafting history of the AUMF and DTA led the Court to conclude that Congress had not repealed or amended the Uniform Code of Military Justice governing military tribunals; the alternative procedures for these tribunals devised by the President violated the Code and could not stand. *See* 548 U.S. at 593-595. And of course in *Youngstown*, Justice Jackson explained that President Truman's seizure of the steel mills violated at least "three statutory policies" enacted by Congress, pressing the President's action into category three, where it could not be justified. *See* 343 U.S. at 639 (Jackson, J., concurring). This case is like those. The Executive has acted against the will of Congress, without viable claim to independent authority.

CONCLUSION

For the foregoing reasons, the Court should hold that the Executive may not use the material witness statute to preventively detain U.S. citizens and others lawfully within the United States.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-98

IN THE

United States Supreme Court

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR FORMER FEDERAL PROSECUTORS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the former federal prosecutors identified in the Appendix.[1] *Amici* have all worked as federal prosecutors. We submit this brief in support of Respondent.

Collectively, *amici* have decades of experience in federal criminal prosecution, including prosecuting domestic and international terrorists. *Amici* are familiar with both the protocols and historical practices of the Department of Justice regarding material witness arrests and detention. *Amici* set forth their understanding of the purpose and proper use of the federal material witness statute in an effort to provide helpful context for the issues to be decided by the Court.

SUMMARY OF ARGUMENT

The federal material witness statute, 18 U.S.C. § 3144, gives prosecutors the power to secure a witness's presence in order to obtain the witness's testimony in a criminal proceeding. The statute's singular purpose is clear both from its structure and its plain language. First, an individual may be arrested only if the prosecutor shows that the individual's "testimony . . . is material in a criminal proceeding." This predicate for issuance of a material witness warrant confirms that the purpose of the statute is to enable a prosecutor to

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[1] The parties have consented to the filing of this brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

obtain evidence from a witness for a criminal case. Second, the prosecutor must show that "it may become impracticable to secure the presence of the person by subpoena." This second predicate is designed to enable the prosecutor to secure a witness's presence at a time when the witness is accessible to the prosecution, under circumstances where the witness might later be unavailable. The conditions for a material witness's release also confirm the statute's purpose: a prosecutor must release the witness once she is deposed. The statute does not permit continued detention of an individual to achieve some other aim.

Petitioner argues that a prosecutor may detain an individual under Section 3144 even if the prosecutor has no intention of using that individual's testimony in a criminal proceeding. The argument implies that a prosecutor could request a material witness warrant from a magistrate judge without disclosing to the judge that the prosecutor has no intention of obtaining testimony from the witness at all. Accepting this argument would authorize prosecutors to withhold material information from an issuing court.

Petitioner claims that if the material witness statute's only legitimate use is to secure a witness's testimony, prosecutors' ability to investigate individuals for criminal wrongdoing will be impeded. Nothing in the statute, however, prevents a prosecutor who arrests an individual as a material witness from continuing her investigation and later charging the witness criminally if the evidence supports the charge. Equally, however, the statute does not authorize prosecutors to detain an individual under the false label of

"material witness" if the prosecutor in fact has no intention of using the individual as a witness.

ARGUMENT

Respondent's factual allegations, which must be taken as true at this stage of the proceedings, *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), are set out in the First Amended Complaint. *See* J.A. 11-58. Respondent is a native-born U.S. citizen and a graduate of the University of Idaho. J.A. 22-3. While in college, Respondent converted to Islam. J.A. 23. In the wake of September 11, the FBI allegedly "conducted surveillance of Mr. al-Kidd and his then-wife (also a native-born United States citizen) as part of their broad terrorism investigation" in Idaho. J.A. 23.

In March of 2003, Respondent was preparing to travel to Saudi Arabia on an academic scholarship. While Respondent was at the ticket counter at Dulles International Airport, FBI agents arrested him on a material witness warrant. The warrant had been issued by an Idaho magistrate judge on the basis of an FBI agent's affidavit stating that Respondent was needed as a witness in the trial of Sami Al-Hussayen, a graduate student at the University of Idaho who had been indicted for visa fraud and making false statements to the government. J.A. 23-4, 29, 38-9.

Respondent alleges that prior to his arrest, he had cooperated with the FBI's requests for interviews, that he had never missed a meeting with the FBI agents, and that he had not heard from the FBI for approximately six months. J.A. 26-7. He also alleges that the FBI never told him "that

he would be needed as a witness in the Al-Hussayen trial (or any other proceeding) or ask[ed] him if he would agree to testify," and never told him "that he could not travel abroad or that he must consult with the government before he scheduled a trip abroad." J.A. 26. Respondent further alleges that he was never asked to relinquish his passport, as another witness in the Al-Hussayen trial was asked to do. J.A. 26-7.

Respondent alleges that upon his arrest, he was handcuffed, taken to a "police substation at the airport," and interrogated about his own religious beliefs, conversion to Islam, and past travels. J.A. 30. In all, Respondent spent fifteen nights in various jails, during which time he was placed in the jails' high-security wings with convicted criminals, strip-searched, and shackled. J.A. 13, 31-5. Even after Respondent's release from detention, he was subject to significant supervisory conditions limiting his freedom for more than a year. J.A. 38. The government never moved to vacate these conditions; Respondent himself petitioned an Idaho court to have them removed once Al-Hussayen's trial ended. J.A. 14, 38-9. In all the time that passed between Respondent's arrest and the trial of Al-Hussayen, the prosecution never called Respondent as a witness at that or any other trial; nor did the prosecution ever seek to depose him. J.A. 38-9.

Respondent contends that the prosecutors and FBI agents did not view him as a witness. Rather, Respondent alleges that their "purpose in arresting and detaining [him] was not to secure his testimony, but to preventively hold and investigate him for possible criminal wrongdoing." J.A. 40; *see*

also J.A. 52 (alleging that Respondent "was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony was needed"); Resp't's Br. 32 (discussing allegations). Among other things, Respondent points to FBI Director Robert Mueller's testimony before Congress regarding the government's anti-terrorism efforts, where Director Mueller specifically cited Respondent's arrest as one of the federal government's successes in the War on Terror. J.A. 37. Director Mueller did not inform Congress that Respondent had been arrested on a material witness warrant, and not as a criminal suspect. In sum, Respondent alleges that he was arrested pursuant to a "nationwide policy instituted by [P]etitioner," former Attorney General John Ashcroft, which directed federal law enforcement officials to "use[] the material witness statute to detain and investigate suspects for whom the government lacked probable cause of wrongdoing, and not to secure testimony." Resp't's Br. at 5.

I. THE ONLY LEGITIMATE USE OF THE MATERIAL WITNESS STATUTE IS TO SECURE THE PRESENCE OF A MATERIAL WITNESS TO TESTIFY IN A CRIMINAL PROCEEDING

A. The Material Witness Statute Is An Important Law-Enforcement Tool For The Successful Prosecution Of Federal Crimes

Congress enacted the current material witness statute as part of the Bail Reform Act of 1984. *See* Pub. L. No. 98-473, 98 Stat. 1837, 1976-81 (1984). The statute, codified at 18 U.S.C. § 3144 and specifically entitled "[r]elease or detention of a material witness," provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3144.

The material witness statute is a powerful, effective, and necessary law-enforcement tool. Its use can be indispensable to the successful prosecution of federal crimes, particularly where there is probable cause to believe that the witness is contemplating leaving the jurisdiction or otherwise refusing to comply with a subpoena. For example, prosecutors often rely on the statute to secure the presence of aliens as witnesses in the prosecution of alleged human traffickers and smugglers. *See Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992) ("To successfully prosecute persons unlawfully transporting undocumented aliens into the United States, the Department of Justice . . . engaged in the practice of detaining some undocumented aliens as material witnesses for the criminal prosecution of the alleged alien smugglers."); *see also United States v. Lai Fa Chen*, 214 F.R.D. 578 (N.D. Cal. 2003); *United States v. Mercedes*, 164 F. Supp. 2d 248 (D.P.R. 2001); *United States v. Huang*, 827 F. Supp. 945 (S.D.N.Y. 1993). In such cases, prosecutors may have a "legitimate concern" that, absent the power to seek their detention, it would be impracticable to obtain evidence from these undocumented aliens because they are subject to deportation and are "hardly motivated to stick around for trial to testify . . . ." *Aguilar-Ayala*, 973 F. 2d at 418-19.

Similarly, in *United States v. Nai Fook Li*, 949 F. Supp. 42 (D. Mass. 1996), the U.S. Coast Guard and the former Immigration and Naturalization Service seized a boat carrying Chinese citizens. Prosecutors charged the defendants with conspiring to smuggle the passengers into the United

States. *Id.* at 43. In order to secure the witnesses' presence at a criminal proceeding, prosecutors arrested five people from the boat on material witness warrants. *Id.* at 45. The court upheld the government's right to hold the witnesses until trial because they would be repatriated to China if they were not detained and would thus be unavailable to testify. *Id.* at 46.

B. The Material Witness Statute's Plain Text Makes Evident That It Should Be Used Only When A Prosecutor Is Genuinely Interested In Securing The Testimony Of A Witness

The material witness statute provides prosecutors with an important law-enforcement tool: the power to secure a witness's presence to testify in a criminal proceeding. It has no other legitimate purpose, and, in our experience, prosecutors understand that it should not be used to achieve some other, unauthorized objective. This understanding flows directly from the statute's plain language and structure.

Section 3144 contains two components. The first sets forth the circumstances under which a court may issue a warrant for a witness's arrest: specifically, where a prosecutor can show (1) that the individual's testimony is material in a criminal proceeding; and (2) that it may become impracticable to secure the individual's presence at those proceedings by subpoena. The statute's second component limits the amount of time that a witness can be held on a material witness warrant to only such time as required for a witness's testimony to be secured through deposition, and even

then, only for a "reasonable period of time" necessary to arrange the deposition.

The elements of Section 3144 make clear its sole purpose: empowering the prosecutor to seize and hold a witness to obtain that witness's testimony. The statute plainly provides that it will be invoked only where a prosecutor seeking a material witness warrant is genuinely interested in obtaining testimony from that witness.

To obtain court approval for a material witness warrant, a prosecutor must meet both tests, both of which confirm that the government's purpose in seeking a material witness warrant must be to obtain testimony from the individual being detained for use in some other criminal proceeding. First, an individual may be arrested as a material witness only if the prosecutor can show that the individual's testimony "is material in a criminal proceeding." This element plainly implies that when a prosecutor seeks a warrant for such an individual's arrest, the prosecutor genuinely believes that the individual possesses material testimony and genuinely intends to make use of that evidence in a pending criminal proceeding.

The prosecutor must also show that "it may become impracticable to secure the presence of the person by subpoena." A subpoena is the usual method by which a prosecutor will ensure that a witness will appear at a grand jury, deposition, or trial. *See Taylor v. Illinois*, 484 U.S. 400, 415-16 (1988) ("Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial."). The use of a material witness warrant is thus an extraordinary means of secur-

ing the presence of a witness, and it is only to be employed when the prosecutor can show that the witness may not later be subject to the court's jurisdiction or may refuse to comply with a subpoena. Thus, the second predicate for issuing the warrant also confirms that the statute's purpose is to secure an individual's presence at a criminal proceeding so that her testimony can be presented in that proceeding.

That the statute is meant to secure a witness's testimony is also clear from Section 3144's explicit direction relating to the release of a material witness. A prosecutor must release a material witness once the witness has given testimony. The statute nowhere suggests that the witness may be incarcerated further to achieve some other objective, such as an investigation of the witness as a criminal suspect. This limitation on the duration of a witness's detention is based on the statute's purpose of securing a witness's testimony so that it may be presented in a criminal proceeding. Once the witness has been detained and the witness's testimony secured, the witness must be released.

If there were any doubt about the statute's purpose, it is dispelled by the statute's explicit use of the word "witness." Before a prosecutor asks a judge to issue a warrant to arrest a material witness, the prosecutor must necessarily have concluded that the witness is someone who could provide testimony for use in another person's criminal proceedings. This is the obvious meaning of the word witness. *See Black's Law Dictionary* 1740 (9th ed. 2009) (defining "witness" as "[o]ne who sees, knows, or vouches for something; . . .

[o]ne who gives testimony under oath or affirmative . . . ."); *see also Melendez-Dias v. Massachusetts*, 129 S. Ct. 2527, 2551 (2009) (Kennedy, J., dissenting) (explaining that a "witness" is "one who witnesses (that is perceives) an event that gives him or her personal knowledge of some aspect of the defendant's guilt").

Prosecutors recognize that Section 3144's value is that it empowers a federal court to order a witness's arrest solely to obtain that witness's testimony, even where the witness has done nothing wrong or the prosecutor lacks evidence to support a traditional arrest warrant. Prosecutors are well aware of the Constitution's limitations on arrest and detention and they understand that these limitations must be observed rigorously. The material witness statute does not—and indeed cannot—offer prosecutors an end-run around the Fourth Amendment rule that the arrest and detention of a *suspect* must be supported by probable cause to believe that the arrestee herself has committed a crime.

II. De-Linking The Statute From Its Purpose Of Securing Testimony Would Undermine The Rule Of Law

Contrary to prosecutors' settled understanding about the material witness statute's legitimate use, Petitioner argues that a prosecutor seeking to detain an individual under Section 3144 need not have any genuine intention of using that individual's testimony in a criminal proceeding. *See* Pet'r's Br. 29-32. As long as a prosecutor can satisfy Section 3144's objective requirements, *i.e.*, materiality and impracticability, Petitioner con-

tends that it would not contravene the law for a prosecutor to seek a material witness warrant despite having no intention of using the so-called witness as a witness. *See id.*

Petitioner's argument ignores the statute's purpose. It is a clear practical reality that any judge would believe that she is issuing a Section 3144 warrant because the prosecutor needs the witness's testimony. This is the clear implication of Section 3144's text. Magistrate judges have a right to rely on the representations of prosecutors and other law enforcement officials who come before them seeking warrants. A prosecutor who obtains a material witness warrant without telling the issuing judge that she does *not* intend to use the witness's testimony in another proceeding has arguably omitted a material fact from her application to the magistrate, or at the very least misled the judge about the reason an individual is being arrested.

Even if such a material omission does not actually rise to the level of a false statement, it unquestionably undermines the rule of law and respect for the statute's plain language. *See United States v. Hasting*, 461 U.S. 499, 522 (1983) (Brennan, J., concurring in part, dissenting in part) (stating that prosecutors "are officers of the court charged with upholding the law . . . ."); *see also Lacy v. Cnty. of Maricopa*, 631 F. Supp. 2d 1183, 1196 (D. Ariz. 2008) (referring to prosecutors "who, through false statements, prevail[] upon a magistrate to issue a warrant" as "reprehensible" because the prosecutor "maliciously abuse[d] a position of trust" (quotations and citations omitted)). As this Court has observed, "jus-

tice must satisfy the appearance of justice." *Offut v. United States*, 348 U.S. 11, 14 (1954). Authorizing prosecutors to obtain court orders based on misleading applications would shake the faith of the judiciary in the prosecutors who appear before them, and the faith of the public in our system of justice.

This Court has repeatedly held that interpretations of statutes that lead to "absurd and unjust results" must be rejected because they could not reflect what Congress intended when it passed the statute. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (quotations and citations omitted); *see also Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Danny Keffeler*, 537 U.S. 371, 388 n.11 (2003); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 449-50 (2002); *Reno v. Am.-Arab An'i-Discrimination Comm.*, 525 U.S. 471, 480 (1999). Petitioner's interpretation of the statute would lead to such a result. It is absurd to believe that Congress passed a statute that would permit prosecutors to materially mislead judges in a manner that would undermine general respect for the rule of law.

III. The Material Witness Statute Does Not Prevent Prosecutors From Investigating An Individual Detained As A Material Witness So Long As The Prosecutor Intends To Obtain Testimony From The Individual

Petitioner claims prosecutors' ability to investigate individuals for criminal wrongdoing would be unnecessarily hampered if the only legitimate use of the material witness statute is to secure a

witness's testimony for a criminal proceeding. This contention is without basis. Prosecutors may act with mixed motives when they seek a material witness warrant, so long as their intention to seek the witness's testimony for an independent criminal proceeding is genuine. Indeed, they may—and often do—view the same individual as both a material witness and as a potential criminal suspect without running afoul of the statute. So long as the motive of securing testimony is genuine, and not pretextual, use of the material witness statute is appropriate.

Petitioner argues that a prosecutor's fear of personal liability for acting pursuant to these dual motives will keep the prosecutor from arresting an individual as a material witness, thus depriving the prosecution of needed testimony. *See* Pet'r's Br. 39-40. This fear allegedly would "discourage prosecutors from employing the material-witness statute in situations for which it was designed and in which the public interest favors its use." *Id.* at 40.

Prosecutors, however, have never thought of Section 3144 as so limiting. A prosecutor can seek an individual's detention as a material witness and later decide to charge the individual criminally. That alone would not be a misuse of the statute, and Respondent does not claim it would be. Similarly, a prosecutor could seek someone's detention as a material witness even if she also simultaneously suspected the person of criminal wrongdoing. Standing alone, this would not be a violation of the statute. What would be an abuse of the statute would be for a prosecutor to seek the arrest of a person under Section 3144 when she

has no intention of using the person's testimony in a criminal proceeding or otherwise believes that the person's presence could adequately be secured by subpoena.

Prosecutors understand that they may investigate an individual arrested pursuant to a material witness warrant to determine if the individual committed a crime. This includes crimes related to the subject matter of the criminal proceedings at which the witness will testify. That prosecutors have this ability under the statute is only logical. It is possible that an individual who a prosecutor initially believes has important and material testimony may have this information because the individual actually participated in the crime. In such a case, the prosecutor may only become fully aware of the individual's involvement in the crime after she has legitimately detained the individual on a material witness warrant.

For example, in *United States v. Nichols*, 77 F.3d 1277 (10th Cir. 1996), cited by Petitioner, prosecutors initially arrested Nichols as a material witness. *Id.* at 1278. There is no suggestion in *Nichols* that the prosecutors did not genuinely want Nichols's testimony. Prosecutors initially believed that Nichols was a material witness because they had substantial information linking him to Timothy McVeigh, whom the FBI had already charged with blowing up the Murrah Federal Building by the time prosecutors obtained the Nichols warrant. *See United States v. McVeigh*, 940 F. Supp. 1541, 1546-50, 1562 (D. Colo. 1996). They also believed that it would be impracticable to secure Nichols's testimony by subpoena, because Nichols had renounced his U.S. citizen-

ship and thus was unlikely to respond to a subpoena. *See id.* at 1562. After prosecutors concluded that Nichols was a material witness, they continued to investigate his conduct. Prosecutors realized the full extent of Nichols's participation in the bombing only as a result of this further investigation, and they then charged him with offenses related to the bombing. *See Nichols*, 77 F.3d at 1278-79. Thus, Nichols's arrest would not have violated the material witness statute unless the prosecutors initiated the arrest solely to hold him while they continued their investigation of Nichols's own criminal offenses.

Compare *Nichols*, however, with a scenario that would run afoul of Section 3144: assume that prosecutors, having indicted one broker in a financial services firm for insider trading, come to suspect another broker of involvement in the scheme after uncovering suspiciously-timed phone calls between the two. Assume that the FBI questions this second broker on multiple occasions, and each time he fully cooperates in the questioning, never once missing a meeting. The prosecutor decides that the second broker's testimony is not needed for the case already under indictment, but continues to believe that the second broker is also guilty of insider trading, even though she lacks probable cause to charge him.

Assume that after conducting these interviews, the FBI learns that the second broker is about to be reassigned to a branch in China, a country that has no extradition treaty with the United States. Unless the prosecutor actually intends to present the second broker's testimony in the pending proceeding, and would be unable to obtain that tes-

timony absent an arrest, the prosecutor would have no basis for seeking a material witness warrant. Under Petitioner's interpretation of Section 3144, however, the prosecutor would be empowered to obtain a material witness warrant for the second broker simply by pointing to the objective facts that he had significant ties to the defendant and was about to be living abroad and beyond the reach of a subpoena. This position finds no support in the statute and cannot be reconciled with the Fourth Amendment's requirement of probable cause. Prosecutors understand that using the material witness statute as a means to hold an individual in the hope that further investigation will lead to probable cause—or worse, as a means to separate an individual from society without a trial, even when based on the government's well-intended suspicions—would violate the most basic protections guaranteed by the Fourth Amendment.

The difference between the insider-trading hypothetical and *Nichols* helps to demonstrate the limit imposed by Section 3144 on a prosecutor's ability to investigate. This limit is sensible: a prosecutor cannot arrest and detain individuals simply because she finds it easier to investigate them when they are detained, while all along operating under the pretense that they are material witnesses.

CONCLUSION

For the foregoing reasons, the *amicus curiae* urge this Court to affirm the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX

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Andrew Weissmann served as Special Counsel to the Director of the Federal Bureau of Investigations in 2006. He was Director of the United States Department of Justice's Enron Task Force from 2004 to 2006 and Deputy Director from 2002 to 2004. From 1991 to 2002, he served as an Assistant United States Attorney and Chief of the Criminal Division for the Eastern District of New York.

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AMICUS CURIAE BRIEF

No. 10-98

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF THE *AMICI CURIAE*

Human Rights Watch, a non-profit organization, is the largest U.S.-based international human rights organization, and was established in 1978 to investigate and report on violations of fundamental human rights in some 90 countries worldwide. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others in order to end abusive practices. In June 2005, Human Rights Watch and the American Civil Liberties Union jointly published the report *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11* (the "Report"). Human Rights Watch has a substantial interest in ensuring that the material witness statute is applied lawfully and with judicial controls sufficient to prevent the abuse of detainees.[1]

National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders and law professors. The American Bar Association (the "ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient and fair administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory and criminal investigations. In furtherance of this and its other objectives, the NACDL files *amicus curiae* briefs addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because its members share deep concern regarding the Government's unlawful use of the material witness statute since the attacks of September 11, 2001, as well as the harm to individuals that has resulted. NACDL works directly with people who have been detained as a result of the wrongful application of the statute. Therefore, NACDL has an interest in ensuring that the statute is applied lawfully and with judicial controls sufficient to prevent the abuse of detainees.

SUMMARY OF ARGUMENT

The material witness statute, 18 U.S.C. 3144 (the "statute"), provides for the arrest and detention of witnesses only when absolutely necessary and for the limited purpose of securing their testimony when material to a criminal proceeding. The statute does not provide for the detention of persons suspected of criminal conduct – but against whom there is insufficient proof to meet constitutional requirements for arresting or charging as criminal suspects – in order to conduct further investigation. Here, the U.S. government (the

"Government"), through the Department of Justice ("DOJ"), misused the statute to arrest and detain Mr. Abdullah al-Kidd ("al-Kidd"), a native-born United States citizen whose testimony was never taken in the proceeding for which he was purportedly detained. Al-Kidd was arrested in the manner of a dangerous criminal suspect (except without *Miranda* warnings), subject to coercive custodial interrogation about his own activities without counsel, detained for fifteen nights in high-security prisons with convicted criminals, routinely shackled and strip-searched multiple times during his detention, and released only subject to restrictive conditions.

The arrest and detention at issue in this case is not unique: Petitioner John Ashcroft ("Ashcroft") implemented an investigative use of the statute to detain persons against whom evidence was insufficient to meet constitutional requirements for criminal charges or arrest. Amicus Human Rights Watch's Report provides the results of interviews with seventy individuals detained under the material witness statute since the attacks of September 11, 2001, as well as interviews with detainees' attorneys and family, information obtained through FOIA requests, and publicly available accounts. If the DOJ truly viewed these detainees as "witnesses," it could have subpoenaed their testimony or deposed and released them, as provided by the statute. However, the DOJ never deposed or called as witnesses many of those detained under the statute, including al-Kidd. To the contrary, and as set forth in the Report and in other public sources, "witnesses" detained under the statute were held for prolonged periods in abusive conditions and released subject to Government monitoring and tight travel and other lifestyle restrictions. Their accounts, detailed below, demonstrate that these

"witnesses" were regarded and treated as *criminal suspects* and that the statute was systematically abused to detain such individuals without attempting to meet constitutional requirements for bringing criminal charges or arrest. The extreme conditions of these detentions, the frequency with which they occurred, and public statements made by Petitioner and other government sources strongly suggest that these detentions were made pursuant to Petitioner's policy of using the statute to detain and investigate suspects without probable cause, rather than to secure testimony.

Moreover, in implementing this policy, the Government has successfully limited public scrutiny by shrouding the policy's details in secrecy. Records of material witness proceedings are routinely sealed, and the most basic information is kept secret. Thus, *amici* cannot be certain of the full extent of the abuses.

ARGUMENT

The material witness statute allows deprivation of liberty for the limited purposes of procuring testimony and only when that testimony cannot be obtained under subpoena. No Congressional statute authorizes the arrest, detention, and governmental supervision of United States citizens based on the mere suspicion of criminal activities. Detaining criminal suspects who cannot constitutionally be charged with criminal conduct is contrary to fundamental American values that are enshrined in the

Fourth,[2] Fifth,[3] Sixth, and Fourteenth Amendments of the U.S. Constitution.[4] Detention of criminal suspects without charge is also a form of arbitrary detention prohibited under international law.[5] Petitioner Ashcroft, however,

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2. "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest.'" *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (quoting *Henry v. U.S.*, 361 U.S. 98, 101 (1959)); *see also* U.S. CONST. Amend. IV.

3. The Due Process clause of the Fifth Amendment authorizes civil, non-punitive detention only in narrow and limited circumstances. There must be a specific justification that is "sufficiently weighty" to overcome the individual liberty interest, and the least restrictive means available must be used, namely means that are not "excessive in relation to" the non-punitive purpose for which the individual is detained. *U.S. v. Salerno*, 481 U.S. 739, 747, 751 (1987) (pre-trial detainees).

4. "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." Because of this, a suspect can only be arrested and charged upon a showing by the government of probable cause and the preventive detention of that suspect can only occur in certain special and "'narrow' non-punitive 'circumstances,'" where a special justification outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)) (citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

5. *See* International Covenant on Civil and Political Rights ("ICCPR"), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 9 (providing that "everyone has the right to liberty and security of person"). The United States has

distorted the material witness statute into a sweeping investigative detention statute. Petitioner Ashcroft's policy deprived persons suspected of criminal conduct, who were ostensibly only witnesses, of the constitutional safeguards to which criminal defendants are entitled under the Fourth Amendment and other constitutional provisions.

The accounts discussed below show that rather than being viewed as valuable witnesses in important Government investigations, material witnesses detained as part of the Government's response to September 11 were actually regarded as suspects. Many detainees with supposedly "material" information had only thin and insubstantial ties to the crimes purportedly under investigation. And even where detainees showed a history of cooperation with Governmental authorities, the statute's requirement that the use of a subpoena be otherwise impracticable was completely ignored. The detainees were shackled and strip-searched, put in solitary confinement, and coercively interrogated regarding their own actions—not events they allegedly witnessed.

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been a party to the ICCPR since 1992. *See also* Human Rights Committee, Gen. Comment No. 8, HRI/GEN/1/Rev.9 (Vol. I) (June 30, 1982) (stating that Article 9 of the ICCPR is "applicable to all deprivations of liberty"); ICCPR Art. 9 (3) (stating that "It shall not be the general rule that persons awaiting trial shall be detained in custody."); MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 224-225 (2d ed. 2005) (explaining that, in accordance with Article 9 of the ICCPR, a person's liberty may not be curtailed arbitrarily, either through arbitrary laws or through the arbitrary enforcement of the law in a given case, and that to comply with Article 9, deprivation of liberty "must not be manifestly unproportional, unjust or unpredictable.").

THE GOVERNMENT UNLAWFULLY DETAINED RESPONDENT AND OTHER "MATERIAL WITNESSES" AS PART OF ITS SYSTEMATIC MISUSE OF THE MATERIAL WITNESS STATUTE

Respondent al-Kidd's arrest and detention as a material witness, described below, is representative of the manner in which the material witness statute was misused as a pretense to detain individuals suspected of terrorist activity in connection with the events of September 11. The accounts of eleven additional material witness arrests, told alongside al-Kidd's story, illustrate that rather than being treated as valuable witnesses in important Government investigations, material witnesses detained as part of the Government's response to September 11 were, like Respondent, systematically treated as threatening individuals suspected of crimes. The experiences of the "material witnesses" described below, as well as others whose stories are known, illustrate four central themes in the Government's material witness arrest, interrogation, detention, and release practices. These "witnesses" were:

- arrested in the manner of dangerous criminals, but denied *Miranda* warnings;

- interrogated about their own activities without access to counsel – not about activities they purportedly witnessed;

- detained for prolonged periods of time under high security conditions; and

- only released subject to restrictive conditions even when their testimony was no longer being sought.

The manner of the arrest of innocent material witnesses detained in connection with terrorist-related investigations – many of whom are U.S. citizens and professionals with no criminal record – is indistinguishable from the arrest of a dangerous criminal. "Material witnesses" were routinely arrested by multiple agents, at gunpoint, and handcuffed and shackled. The FBI also transported these "witnesses" to detention centers in a manner that suggests they were perceived to be dangerous. Yet no official hoping to elicit helpful testimony from a witness purposefully terrorizes them during their detention. Indeed, the use of force was so extreme when arresting and transporting some "witnesses" that it plainly reveals that the DOJ's suspicion of criminal activity was the true impetus for their arrest.

The manner and substance of "material witness" interrogations further confirms that Government officials were investigating each of these purported "material witnesses." Al-Kidd and other material witness detainees were interrogated at length about their *own* activities – rather than the activities of others. These interrogations often occurred without counsel or other procedural safeguards. And, in more than two dozen of the seventy material witness cases analyzed by the Report, the government did not provide a detention hearing for three or more days following arrest, and in ten cases the witness never received *any* kind of hearing at which they could contest their detention.[6] Yet under U.S. law, as well as

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6. HUMAN RIGHTS WATCH AND AMERICAN CIVIL LIBERTIES UNION, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 at 48 (2005) ("*Witness to Abuse*").

international law, a person deprived of his or her liberty must be "promptly" brought before a judge or judicial officer.[7]

The detentions endured by these material witnesses were prolonged, harsh experiences. Individuals detained under Petitioner's policy were held under high security conditions for time periods far longer than necessary to secure testimony, and treated as though they were dangerous criminals. First Amended Complaint ("FAC") ¶ 131 ("a federal official noted that after September 11, 2001, the DOJ's Bureau of Prisons often 'did not distinguish between detainees who . . . posed a security risk and those detained aliens who were uninvolved witnesses.") (citing "The September 11th Detainees," April 2003 ("OIG 2003 Report") at 20). While Congress has authorized the arrest of witnesses, it has consistently placed restrictions on the jailing of witnesses, historically permitting detention only if a witness did not provide assurances to a court that he would testify.[8] The material witness statute itself provides that "*No material witness may be detained* because of

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7. When an individual has been deprived of a liberty interest, the Fifth Amendment right to Due Process guarantees a prompt hearing, conducted at a meaningful time and in a meaningful manner. *Barry v. Barchi*, 443 U.S. 55, 66 (1979). International law similarly requires that detained persons shall be entitled to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, *supra* note 5, Art. 9(4).

8. Michael Greenberger, *Infinite Material Witness Detention without Probable Cause: Thinking Outside the Fourth Amendment* in AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES 92 (Thomas E. Baker and John F. Stack, Jr. eds., 2006)

inability to comply with any condition of release *if the testimony of such witness can adequately be secured by deposition*, and if further detention is not *necessary* to prevent a failure of justice."[9] During the drafting of the current 18 U.S.C. 3144, the Senate Appropriations Committee stressed that "whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody."[10] Nonetheless, more than one third of the material witness detainees after September 11, 2001 were held for two months or more, and many were held without being given the opportunity to be deposed.[11] Over the course of these prolonged detentions, "material witness" detainees were consistently subject to harsh treatment.[12]

After release from detention, these material witnesses were also subject to continuing restrictions on their liberty for far longer than necessary to secure testimony. Material witnesses have been stripped of their passports, subject to a curfew, required to check-in regularly with Government authorities, and even been forced to wear an

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9. 18 U.S.C. § 3144 (emphasis added).

10. S. REP. No. 98-225, at 28 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 ("[T]he committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.")

11. *Witness to Abuse*, *supra* note 6, at 26 and 78-79.

12. Greenberger, *supra* note 8, at 89 ("It is clear that the Ashcroft Justice Department detains grand jury material witnesses under harsh and coercive conditions. Facts surrounding the recent arrests of other grand jury material witnesses illustrate that these indefinite and often harsh detentions are part of a tactic to coerce incriminating statements.")

electronic bracelet.[13] Some of these restrictive conditions, such as in the case of al-Kidd, have even persisted *after* the Government decided not to call the "material witness" to testify.

The accounts below represent only a fraction of the improper arrests and detentions detailed in *amicus'* Report. There may be other cases that have not yet come to light. Secrecy has been the rule, not the exception. Indeed, there were release orders that prevent many material witnesses from speaking of their experience to anyone, even family members.[14] The DOJ, moreover, has routinely refused access to information on individual detentions sought by the attorneys and the families of detainees.[15] The DOJ refused access to information about the use of the policy to the general public[16] and

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13. *Witness to Abuse*, *supra* note 6, at 30-31.

14. Eric Lichtblau, Bush's Law: The Remaking of American Justice 31 (2008).

15. "The government refused to say how many people it had held as material witnesses, sealing court records on national security grounds and leaving the media and rights groups to guess based on anecdotal evidence." *Id.* at 27; *see, e.g., U.S. v. Awadallah*, 202 F. Supp. 2d 55, 59-61 (S.D.N.Y. 2002) (Awadallah's location was kept secret from his family *and attorney* until after he had been transferred from San Diego to New York).

16. *See* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 Vand. L. Rev. 677, 686, 691 (2005) (in the case of Mohammed Bellahouel, the "government fought to keep the entire matter sealed and asked to file even its response to the certiorari petition under seal. [...] By then, [the material witness] had been living freely in

even refused to turn over information when directed to do so by the House of Representatives Committee on the Judiciary.[17] In fact, most material witness cases remain under seal today. [18] Although the strict secrecy

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Florida for months and had never been charged with any crime. The Court in fact did keep most of Mr. Bellahouel's petition and most of the government's opposition under seal and ultimately denied review."). *See generally Center for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 922 (D.C. Cir. 2003) ("The government withheld all requested information with respect to material witnesses. Although the government has refused to disclose a comprehensive list of detainees' names and other detention information sought by plaintiffs, the government has from time to time publicly revealed names and information of the type sought by plaintiffs regarding a few individual detainees, particularly those found to have some connection to terrorism."); Rachel Stevens, *Center for National Security Studies v. United States Department of Justice: Keeping the USA PATRIOT Act in Check One Material Witness at a Time*, 81 N.C. L. Rev. 2157, 2175-2176 (June 2003) (The government's secretive behavior with respect to material witnesses is dangerous because it allows the federal government to "hold people anonymously and indefinitely without filing criminal charges" while allowing the government to build cases against those detained and other would-be targets).

17. Bascuas, *supra* note 16, at 686, 688 ("Perhaps realizing that DOJ was itself responsible for shrouding the 'material witness' detentions in secrecy, the Judiciary Committee requested the government's motions to seal each 'material witness' proceeding and the sealing orders. Tellingly, the DOJ refused to provide those documents as well: 'We are prohibited by court orders from providing any information regarding specific sealed material witness proceedings, including copies of sealing orders. We routinely move to seal all grand jury material witness proceedings...'") (internal citations omitted).

18. In Awadallah's case, the transcript of his detention hearing on September 25, 2002 is sealed and remains sealed today.

imposed by the Government has effectively prevented information on many detained material witnesses from reaching the general public, the accounts of the following individuals – the result of exhaustive interviews and research by *amicus* Human Rights Watch – illustrate the Government's policy of systematically misusing the material witness statute and the criminal-like manner of witnesses' arrest, interrogation, detention, and release.

A. Abdullah al-Kidd

Al-Kidd, a natural-born United States citizen with a wife and child in the country, was arrested at the airport as he was checking in for a round-trip flight to Saudi Arabia where he intended to study at a well-known university to which he had received a scholarship. FAC ¶¶ 5, 14, 42. Despite having cooperated with the FBI on numerous prior occasions, al-Kidd was arrested in the manner of a dangerous criminal – except without *Miranda* warnings: he was tightly handcuffed in the airport in front of staring onlookers and transported for interrogation. *See* Br. in Opp. at 5, 7; FAC ¶¶ 66-67. Immediately after his arrest, al-Kidd was interrogated not about his knowledge regarding the prosecution pursuant to which he was

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U.S. v. Awadallah, 202 F. Supp. 2d 17, 23 (S.D.N.Y. 2002) (only the portions referred to in the court's opinion are public). In the case of Maher Mofeid Hawash, arrested as a material witness in 2003, so secretive were the facts and circumstances surrounding his arrest and detention that supporters protested and wrote to their Congressmen "to attract national attention to his detention." Janine Robben, *What Price Security?: The War on Terror Comes Home to Oregon*, 64-JUL OR. ST. B. BULL. 9, 12 (2004); *see also In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266 (D. Or. 2003).

purportedly detained, but instead about his own religious beliefs, his own conversion to Islam, and his own past travels. FAC ¶¶ 46, 66-68.

Al-Kidd was not released for 15 days. FAC ¶¶ 71, 77. During this period, this supposed "material witness" was detained in high-security conditions, strip-searched, and rarely permitted to leave his cell. *See* Br. in Opp. at 5, 7. At one point, al-Kidd was forced to sit completely naked for a considerable period of time in a cell where he could be seen by guards, including at least one female guard, and other detainees, who were fully-clothed and being processed. FAC ¶ 86. During his transfer from Virginia to Idaho, officers refused to loosen "witness" al-Kidd's handcuffs – despite the fact that they did so for other prisoners on the plane – because "his case was special." FAC ¶ 92. Once he arrived in Idaho, al-Kidd was housed in a high-security unit, where unlike the other cells in the unit, the lights remained on twenty-four hours every day. FAC ¶ 92.

Even after his release, al-Kidd remained subject to restrictive conditions: he was stripped of his passport, was required to live with his in-laws and report regularly to the government, and was only permitted to travel within a four-state area. FAC ¶¶ 9, 103. Yet, despite the length of the detention and the post-release restrictions on his liberty (more than one year), al-Kidd was never asked to provide deposition or trial testimony for the prosecution pursuant to which he was supposedly detained. Indeed, even after the Government failed to call him as a witness, it still did not lift the restrictions placed on his liberty. Al-Kidd had to file a motion with the court in Idaho to vacate the conditions of supervision. FAC ¶¶ 106-107.

B. Tajammul Bhatti

Tajammul Bhatti, a sixty-eight year-old physician and U.S. citizen since 1970, became the focus of an FBI investigation when several of his neighbors, who considered him "suspicious," convinced Bhatti's landlord to break into his apartment. Upon finding books on electronics and flying, the landlord contacted the FBI. After conducting a secret search of Bhatti's apartment, the FBI arrested Bhatti as the only suspect in a grand jury criminal proceeding that hao not yet been instituted at the time of his arrest.[19] Despite the fact that Bhatti himself was a suspect, and was arrested by several FBI agents with guns drawn, he was technically detained pursuant to a "material witness" warrant.

Bhatti was jailed for six days, during which time he was forced to sleep on concrete floors because the jail had no free beds.[20] Though technically detained as a material witness, Bhatti was interrogated without counsel about his own religion and beliefs.[21] Bhatti was barred access to his own court proceedings, and was refused information about the basis of his own detention.[22]

Bhatti was called to "testify" in a grand jury proceeding that was investigating his *own conduct*. Bhatti was never otherwise called to testify as a witness, nor was

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19. *Witness to Abuse*, *supra* note 6, at 22.

20. *Id.* at 23.

21. *Id.* at 50.

22. *Id.*

he ever charged with a crime.[23] Bhatti was released under the conditions that he remain solely in western Virginia, and refrain from discussing his experience with anyone, including his family.[24]

C. Brandon Mayfield

Brandon Mayfield, an American citizen and former Army officer with an honorable discharge, was arrested pursuant to a material witness warrant despite the fact that he was the primary suspect in the March 2004 Madrid train bombings. At the time, Mayfield was living with his wife and three children in Oregon, where he practiced law.[25] The FBI began to investigate Mayfield after his fingerprint was incorrectly matched with a fingerprint found at the scene of the bombing in Madrid.[26] The FBI spent more than a month listening to electronic wiretaps on Mayfield's home, conducting secret searches of his home and office, collecting his DNA, and keeping him under surveillance. After conducting extensive surveillance, the FBI arrested the suspect they were nearly certain was responsible for the Madrid bombing, Brandon Mayfield, on a material witness warrant.[27]

FBI agents arrested Mayfield at his law office and, at

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23. *Id.* at 23, 93.

24. Lichtblau, *supra* note 14, at 31.

25. *See Mayfield v. Gonzales*, No. Civ. 04-1427-AA, 2005 WL 1801679, at *2 (D. Or. July 28, 2005).

26. *Id.* at *2-4.

27. *Witness to Abuse*, *supra* note 6, at 20.

the same time, seized nearly all of his clients' confidential files.[28] Simultaneously, dozens of agents searched Mayfield's home while forcing his wife to sit at the kitchen table and preventing her from making phone calls. Despite having already arrested the "material witness" at his office, Mayfield's home was searched for more than five hours.[29] At the time of Mayfield's arrest, the DOJ had not yet convened a grand jury investigation.[30]

Mayfield was detained in prison for more than two weeks, and held under house arrest for an additional week. Despite being held as a material witness, "the government threatened [Mayfield] with capital punishment during his immunity negotiations."[31] For at least half of his time in custody, Mayfield was kept in a special prison unit that was the most restrictive area of the prison – prisoners were "locked-down" in their cells for 22 hours each day – that was used to house a small number of high-profile and dangerous prisoners.[32] Mayfield was also subject to regular strip-searches during his detention.[33]

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28. *Id.* at 39.

29. *Id.*

30. *Id.* at 21.

31. *Id.* at 32.

32. U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Handling of the Brandon Mayfield Case* (March 2006), at 259-264. The OIG's examination of Mayfield's material witness warrant concluded that "the affidavits contained several inaccuracies that reflected a regrettable lack of attention to detail" and "found the wording of the affidavits to be troubling in several respects." *Id.* at 19.

33. *Id.* at 75.

Brandon Mayfield was never called to testify. On May 24, 2004, the DOJ moved to have him dismissed as a material witness after Spanish authorities apprehended a man whose print actually matched the Madrid print alleged to be Mayfield's.[34] The FBI subsequently admitted that it had mismatched Mayfield's print.[35]

D. Abdallah Higazy

The Government claimed to have evidence suggesting that Abdallah Higazy was involved in the September 11 attacks when it arrested him as a material witness. At the time, Higazy was an Egyptian graduate student in the United States on a grant from the U.S. Agency for International Development ("USAID"). At the suggestion of USAID, he stayed at the Millennium Hotel in New York City during his orientation, which included September 11, 2001. After the attacks and evacuation of the hotel, a hotel security guard falsely claimed that he had found a pilot's air-land radio in a safe in Higazy's room. At the time, the DOJ believed that the hijackers may have had assistance from somebody on the ground. The Government, accepting that the air-land radio belonged to Higazy, clearly considered Higazy to be a coconspirator in the 9/11 attacks. However, despite the Government's belief that he may have played a significant role in the attacks, Higazy was arrested pursuant to a material witness warrant.[36]

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34. *Witness to Abuse*, *supra* note 6, at 21.

35. *See id.* ("A panel of international experts, convened by the FBI, has since rebuked the fingerprint experts for succumbing to institutional pressure to make a false identification."); *see also Mayfield*, 2005 WL 1801679, at *3-4.

36. *Witness to Abuse*, *supra* note 6, at 24.

During his detention, Higazy was interrogated without counsel.[37] He was detained for prolonged periods of time without any opportunity to directly confront the true reason for his detention. He was kept in solitary confinement for thirty-four days.[38] The court at his second detention hearing observed: "'I am concerned that a witness not be held for a prolonged period of time simply on the basis of being a material witness. [The initial] [t]en days struck me as fairly lengthy . . . I would be very, very loath to extend it beyond then absent truly new developments.'"[39]

Higazy was never called to testify. In January 2002, an airline pilot came to the hotel to claim the very same radio attributed to Higazy. It eventually came to light that the security guard had lied to the FBI, having known that the radio was not in the safe in Higazy's room.[40] Upon this exculpatory evidence, Higazy was freed after being held for thirty-four days under the material witness statute.

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37. *Id.* at 59.

38. *Id.* at 24, 59-61. Solitary confinement was a technique used on many of these witnesses. *See, e.g., id.* at 51-52, 87-89 (Tarek Albasti held for two weeks in solitary confinement despite never being asked to testify); *id.* at 57, 90-91 (Omar Bakarbashat held for three months in solitary confinement, never testified, and was eventually charged with working while on a student visa); *id.* at 72-74 (Faisal al Salmi held for three weeks in solitary confinement).

39. *Higazy v. Millenium Hotel and Resorts*, 346 F. Supp. 2d 430, 441-42 (S.D.N.Y. 2004).

40. *Id.* at 443-444.

E. The "Evansville Eight"

On October 10, 2001, FBI agents arrested as material witnesses Fathy Abdelkhalek, an Egyptian waiter at an Olive Garden restaurant in Evansville, Indiana, along with seven of his friends.[41] Abdelkhalek became a terrorist suspect after his wife called the FBI and told them that he was "going to crash [into the Sears' tower.]," and the FBI became suspicious of all eight men after a period of surveillance. FBI agents found Abdelkhalek's friends suspicious because they were all Egyptian, had been on the national Egyptian rowing team with each other, continued to remain friends throughout and after their respective emigration to the United States, and regularly played soccer together every morning at 6:00 a.m.[42] Had FBI agents investigated the complaint before making arrests, they would have likely discovered that the Abdelkhaleks had marital troubles and that Abdelkhalek's wife was prone to fits of anger when her husband sent money to his children in Egypt.[43]

None of the eight men were ever informed of the reason for their arrest.[44] They were transported by armed marshals from Evansville to a federal detention facility in Chicago, Illinois, kept in shackles throughout the flight, deplaned into a specially cleared terminal upon arrival, and driven in a van with an armed escort aided

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41. *Witness to Abuse, supra* note 6, at 87.

42. *Id.*

43. *Id.* at 89.

44. *Id* at 39-40.

by sirens.[45] One of the detainees recalled that "[a]ll the security guards had a gun . . . [a]ll the traffic was stopped. I think I'm dying. We'll go somewhere and die."[46]

At the time of their arrest, none of the men were informed of their right to an attorney, nor were they allowed to contact any attorney.[47] Even after the men were appointed attorneys by the court, one day after their arrest, their court-appointed attorneys could not initially disclose the contents of the material witness warrants to them.[48] The men were ultimately detained in the federal Metropolitan Correctional Center in Chicago, where they were placed in solitary confinement.[49] For ten days, the men had no information as to why or for how long they were detained. These "witnesses" were never asked to testify during their detention or thereafter.[50] A year and a half after their release, the FBI apologized to the men for wrongfully arresting them.[51] In fact, the government has apologized in a number of other "material witness cases." FAC ¶ 136.

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45. *Id.* at 40.

46. *Id.* (reprinting text of interview with Adel Khalil).

47. *Id.* at 50.

48. *Id.*

49. *Id.* at 53.

50. *Id.*

51. *Id.* at 89. *See also* partial transcript of Bryant Gumbel and Gwen Ifill, *Flashpoints: Sacrifices of Security: In Focus: Profiling: The Evansville 8*, PUBLIC BROADCASTING SYSTEM, July 15, 2003, *available at* http://www.pbs.org/flashpointsusa/20030715/infocus/topic_02/evansville.html.

F. Albader al-Hazmi

Dr. Albader al-Hazmi was a San Antonio physician with no prior criminal record when he was arrested as a material witness in September 2001. The Government had come to believe al-Hazmi was somehow involved in the 9/11 attacks. The Government based its suspicion of al-Hazmi on the fact that he shared the last name of one of the hijackers and had been in phone contact with someone at the Saudi Arabian Embassy with the last name "bin Laden," despite the fact that it is a common Arabic name.[52] The DOJ lacked probable cause to arrest al-Hazmi. Accordingly, the DOJ arrested al-Hazmi pursuant to a material witness warrant.

On the day of the arrest, Al-Hazmi and his wife and young children woke up to find five FBI agents in their home with guns drawn. The agents arrested al-Hazmi under a material witness warrant, and proceeded to search his home for twelve hours with little regard for his wife and young children.[53]

During his two-week detention, al-Hazmi was subject to conditions inconsistent with those appropriate for a witness. As he recalled, "I was searched naked many times sometimes twice daily in front of many guards." He also was beaten by guards on multiple occasions; on one such occasion, he recalled, "[o]ne of the guards said to me while beating me, say thanks to Allah."[54] Dr. al-Hazmi

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52. *Witness to Abuse*, *supra* note 6, at 38.

53. *Id.* at 38-39.

54. *Id.* at 43.

was never called to testify in a criminal proceeding or charged with a crime.

G. Mohammed Bellahouel

"Despite an affidavit setting forth nothing but conjecture and relying on an undisclosed source,"[55] Mohammed Bellahouel was arrested as a material witness. Bellahouel was an Algerian immigrant working as a waiter at a restaurant in South Florida. The Government based its suspicion of Bellahouel on two tenuous "connections" to September 11 hijackers: (1) that Bellahouel had seen a movie with one of the hijackers at a local mall, according to an anonymous source (purportedly an unidentified employee of the theater); and (2) that Bellahouel had worked at the restaurant for 10 months, and therefore likely waited on two of the September 11 hijackers who frequently ate there during his shift.[56]

Based on these thin and unsubstantiated allegations, Bellahouel was secretly held in custody for *five months*.[57] He eventually did testify before a grand jury, and was subsequently cleared of any terrorist involvement.[58] However, the Government has kept the facts of this case largely hidden from the public even after Bellahouel's release.

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55. Bascuas, *supra* note 16, at 690.

56. *Id.* at 689-690.

57. *Id.* at 690.

58. *Id.*

H. Ahmed Abou El-Khier

Ahmed Abou El-Khier was arrested as a material witness after a clerk at a motel in Maryland told the FBI he thought El-Khier looked "suspicious." The Government held El-Khier as a material witness on the basis that he had "a relationship with one of the hijackers," but never produced any evidence that he had any connection to the investigation into the events of September 11, 2001. El-Khier was ultimately released without ever testifying.[59]

I. Ismael Selim Elbarasse

Ismael Selim Elbarasse was arrested after Maryland state police stopped him and his family during a family vacation. The officer noticed Elbarasse's wife videotaping the Chesapeake Bay Bridge from the car. Although she was merely filming boats in the bay, the officer presumed she was filming a potential target. Elbarasse, while clearly viewed as a suspect, was held as a material witness for two weeks before being released under house arrest.[60] Additional information is unavailable because all documents in the case of Elbarasse's detention as a "witness" remain under seal.

J. Eyad Mustafa Alrababah

Eyad Mustafah Alrababah was arrested as a material witness after voluntarily contacting the FBI to offer information. Alrababah went to the FBI office in Bridgeport, Connecticut, to inform the authorities that

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59. *Witness to Abuse, supra* note 6, at 83-84.

60. *Id.* at 84-85.

he had recognized four of the alleged hijackers whose pictures he had seen on television. He told the FBI agents that he had first met the men in March 2001 at his mosque in Connecticut, and had subsequently hosted them at his home and drove them from Virginia to Connecticut in June. He had not seen them since June 2001 and had no prior knowledge of the attacks.[61]

Despite the fact that Alrababah had voluntarily come to the FBI to supply information, he was shackled and arrested that day as a material witness. After he was shackled, Alrababah was moved to the Hartford Correctional Center, where he was held for approximately twenty days. In detention, he was held in solitary confinement and strip- and cavity-searched at least once a week. Alrababah was not brought before a judge until one month after his arrest,[62] and was ultimately held as a "material witness" for four months.[63] He was neither deposed nor called to testify.

K. Abdullah Tuwalah

Abdullah Tuwalah was a scholarship student at Marymount University in Arlington, Virginia when he was arrested as a material witness in connection to the grand jury investigation of Saleh Ali Almari, another student who had been briefly enrolled at Marymount. The FBI connected Tuwalah to Almari because they had

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61. *Id.* at 71.

62. *Id.*

63. *Id.* at 26.

met through the Arab social club on campus.[64] Tuwalah's attorney explained that the FBI "said that [Tuwalah] knew some person that knew some person that may have known" something about Almari, describing the connection as "so tenuous."[65] Despite the tenuous connection and the fact that Tuwalah repeatedly informed Government officials that he was willing to testify, Tuwalah was arrested as a material witness.

Tuwalah was detained as a material witness for six weeks, during which the FBI interrogated him several times. Tuwalah was cooperative and even agreed to take a polygraph. Despite his cooperation, however, the FBI treated him in an accusatory manner. Tuwalah's attorney recalled that he had "never seen interview questions like [those directed at Tuwalah]." Even after a grand jury was convened, Tuwalah was never called to testify.[66]

L. Mujahid Menepta

Mujahid Menepta was arrested as a material witness because he attended the same mosque as Zaccarias Moussaui in Norman, Oklahoma. Menepta, a sixty-year-old U.S. citizen with two U.S. citizen sons, spoke to the press outside his mosque because he wanted to protect the younger Muslims, many of whom were immigrants, from the suspicion cast on them in the wake of the September 11 attacks.[67] After speaking to the press,

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64. *Id.* at 27.

65. *Id.* at 83.

66. *Id.* at 27.

67. *Id.* at 71-72.

Menepta was approached by the FBI. Despite voluntarily cooperating with the FBI on multiple occasions, Menepta was arrested as a material witness with a show of force more appropriate for a dangerous suspect: twenty agents with guns drawn were waiting for Menepta outside the rehabilitation center where he worked as a therapist for disabled children.[68]

Menepta was incarcerated as a material witness for five weeks. He was not informed that he had a right to an attorney and was denied the opportunity to make a phone call despite his repeated pleas.[69] When two agents interviewed him, he was still kept in handcuffs.[70] Menepta's attorney explained that the DOJ insisted that it had to continue holding him for undisclosed national security reasons. Menepta was never called to testify.[71]

* * *

As demonstrated by the accounts above, the facts concerning what the Government failed to do – namely, its failure to subpoena witnesses rather than arrest them, its failure to depose and release witnesses rather than keeping them in custody, and its failure to ask these "witnesses" to testify in any capacity – illustrate that these individuals were unlawfully detained suspects rather than material witnesses. In addition to the examples discussed above, there are others, including examples where deposition

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68. *Id.* at 37.

69. *Id.* at 57.

70. *Id.*

71. *Id.* at 72.

requests were affirmatively denied. For example, when witness James Ujaama's attorney Daniel Sears requested to have his client deposed, the DOJ refused. Sears was a former prosecutor and had also represented a number of material witnesses in the past. He stated that "when we offered the government to provide deposition testimony, the government moved him."[72] Similarly, witness Ali Ahmed's attorney, who had also represented several material witnesses before September 11, had his request denied when he suggested his client be deposed.[73] And Mujahid Menepta's attorney stated that despite her efforts, a deposition was not even on the table – the "government made it clear that it was not an option in this case."[74] In fact, of the seventy individuals detained under Petitioner's policy that have been identified, nearly 50 percent have never been asked to testify as witnesses.[75] Br. in Opp. at 14; FAC ¶ 128 (citing Steve Fainaru and Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held In War On Terror Haven't Testified*, WASHINGTON POST, November 24, 2002, at A1).

Prior to the events of September 11, the DOJ typically used the statute to obtain the testimony of non-U.S. citizens in immigration cases.[76] In fact, most material

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72. *Id.* at 79-80.

73. *Id.* at 80 ("No one wanted to take his deposition. There were rumors ... and suspicions about his involvement in terrorism. He never got a deposition – it was just dragged out.").

74. *Id.*

75. *Id.* at 1.

76. Heidee Stoller, *et al.*, *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L.

witnesses were undocumented immigrants detained to testify against those who smuggled them into the United States.[77] But after September 11, the DOJ itself admits that it has used the material witness statute to detain suspects. The DOJ stated publicly that it would use a wide variety of measures to detain terrorist suspects. Petitioner Ashcroft said at an October 31, 2001 press briefing: "Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist attack by taking suspected terrorists off the street. . . . Aggressive detention of lawbreakers *and material witnesses* is vital to preventing, disrupting, or delaying new attacks." *See* Br. in Opp. at 11 (citing *Attorney General Ashcroft Briefing on New Anti-Terrorism Immigration Policies*, Opening Remarks of John Ashcroft, October 31, 2001) (emphasis added).

Internal DOJ reports reflect a similar approach and attitude: "According to an internal report issued by

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& Pol'y Rev. 197, 199 n.7 (2004) (citing the Bureau of Justice Statistics, U.S. Dep't. of Justice, Compendium of Federal Justice Statistics 2000).

77. In the year 2000, of over 4,000 federal material witness arrestees, 94% were detained by the INS, and only 2% were American citizens. Stoller, *supra* note 76, at 199 n.7 (citing the Bureau of Justice Statistics, U.S. Dep't. of Justice, Compendium of Federal Justice Statistics 2000)). *See, e.g., Aguilar-Ayala v. Ruiz*, 973 F. 2d 411 (5th Cir. 1992); *U.S. v. Lai Fa Chen*, 214 F.R.D. 578 (N.D. Cal. 2003); *U.S. v. Nai*, 949 F. Supp. 42 (D. Mass. 1996); *U.S. v. Huang*, 827 F. Supp. 945 (S.D.N.Y. 1993); *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the Western Dist. of Texas*, 612 F. Supp. 940 (W.D. Tex. 1985).

the Justice Department's Office of Inspector General, Petitioner Ashcroft issued a memorandum shortly after September 11, 2001, directing federal law enforcement personnel to use '*every available law enforcement tool*' to arrest persons who 'participate in, or lend support to, terrorist activities.'" *Id.* at 11 (citing OIG 2003 Report at 1). Another internal DOJ document, titled "Maintaining Custody of Terrorism Suspects," includes the following statement: "If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant." *Id.* at 12 (citing OIG 2003 Report at 38-39). Chief of the Terrorism and Violent Crime Section in the Criminal Division of the DOJ, James Reynolds, acknowledged that those detained under the statute were originally questioned because there were indications that they might have connections with terrorist activity, and even suggested that many of those detainees had no material witness information to provide.[78] In short, the DOJ's own statements and internal documents reflect its intent to use the material witness statute as a mechanism for detaining individuals suspected of criminal activity whom it did not have probable cause to otherwise arrest.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

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78. *Center for Nat'l Sec. Studies*, 331 F.3d at 941-42 (Tratel, J., dissenting).

Dated: January 28, 2011

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AMICUS CURIAE BRIEF

No. 10-98

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTERESTS OF AMICI CURIAE

Amici curiae are university and law school professors of legal history who have expertise in English legal history before 1789 and/or American legal history, or professors of criminal procedure who have expertise in the history of Anglo-American criminal procedure. Ricardo J. Bascuas is a professor of law at the University of Miami School of Law. Donald Dripps is a professor of law at the University of San Diego School of Law. Carolyn B. Ramsey is an associate professor of law at the University of Colorado Law School. George C. Thomas III is the Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at the Rutgers School of Law–Newark. Robert W. Gordon is the Chancellor Kent Professor of Law and Legal History at the Yale Law School. (Amici's titles and institutional affiliations are provided only to identify them properly, not to imply any endorsement of the views expressed herein by amici's institutions.)

Amici curiae have a professional interest in ensuring that this Court is fully and accurately informed about the history of material-witness laws. Amici curiae have no personal, financial, or other professional interest in, and take no position on, the other issues raised in the case at bar.[1]

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[1] No party or counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. No person or entity other than counsel for amici made a monetary contribution to the preparation or

SUMMARY OF THE ARGUMENT

The modern practice of arresting and imprisoning material witnesses, without offering them any opportunity to provide bail or a recognizance to guarantee their appearance at trial, is a major departure from the material-witness laws of the past. It is deeply at odds with the principles and purposes underlying material-witness laws that applied for hundreds of years. In considering the arguments presented in this case, this Court should be aware of the history of the law respecting the means of securing the testimony of material witnesses while also protecting the rights of those witnesses.

Until the late twentieth century, a material witness could not lawfully be detained without first being afforded the opportunity to provide a sworn oath or payment promising to return to testify at the trial. Historical precedents allowed for various forms of guaranty: recognizance (an obligation, made in court, by which a person promises to perform some act or observe some condition); recognizance with surety (a bond, guarantee, or security given to support the recognizance); or bail (a security such as cash or a bond required for release of a detainee who must appear in court at a future time). *See* BLACK'S LAW DICTIONARY 160, 200, 1386 (9th ed. 2009). All of these methods were intended to guarantee a material witness's testimony, with imprisonment reserved only for the exceptional case in which the

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submission of this brief. The parties have consented to the filing of this brief.

witness could not, or would not, provide the recognizance, surety, or bail.

The venerable tradition of ensuring the appearance of material witnesses at trial through the use of recognizances or sureties began in the sixteenth century in England with the Marian bail statutes. Justices of the peace could ask anyone who possessed material information related to a crime to swear an oath that they would appear to testify at trial. Only when the witness refused to provide the recognizance (or subsequently failed to make good on the recognizance) could the witness be detained. This was viewed as an exercise of the court's traditional contempt power.

Subsequent statutes and the common law in England and the United States also allowed for the use of sureties, by which someone other than the witness promised to forfeit certain collateral if the witness failed to appear. By the twentieth century in the United States, most statutes and cases referred simply to bail rather than recognizances or sureties, but the principle remained the same. *See, e.g.*, *Barry* v. *United States*, 279 U.S. 597, 617 (1929) (citing 28 U.S.C. § 659). Until the latter half of the twentieth century, the law remained substantially unchanged: Material witnesses were not supposed to be imprisoned unless they refused to provide a guaranty that they would show up to testify, or reneged on their guaranty.

To the extent that the federal statute at issue in this case, 18 U.S.C. § 3144 (1984), is construed to authorize the detention of material witnesses

without allowing the witness instead to provide a recognizance, surety, or bail, it constitutes a dramatic departure from the common law and from prior state and federal statutes. In enacting that statute, Congress explicitly relied on the constitutional analysis in *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971), a circuit court decision that misunderstood and therefore departed from four centuries of settled Anglo-American law, including the Judiciary Act of 1789. *Bacon* sanctioned a practice that not only had no grounding in the common law or prior statutes, but had in fact been decried as a violation of the rights of witnesses in England and the United States, and as a violation of due process in the United States.

Material witnesses who alleged wrongful imprisonment historically have been allowed to maintain actions against justices of the peace, other government officials, and private actors. In determining whether an official could be held liable, courts have examined the official's purposes and intentions. When those purposes or intentions involved false pretexts or other impropriety, courts have allowed suits for torts like malicious prosecution, malicious abuse of process, trespass, and false imprisonment to proceed in spite of defendants' claims of immunity. Since these types of tort claims were the antecedents of modern suits under § 1983, this Court appropriately looks to them for guidance on claims of immunity under that statute. *Malley* v. *Briggs*, 475 U.S. 335, 340 (1986).

ARGUMENT

I. THE GOVERNMENT'S PRACTICE OF DETAINING MATERIAL WITNESSES WITHOUT THE USE OF RECOGNIZANCES OR SURETIES DOES NOT COMPORT WITH HISTORICAL ENGLISH AND AMERICAN LAW.

A. At Common Law in England, Material Witnesses Were Given Opportunities to Provide Recognizances or Sureties to Avoid Detention by a Justice of the Peace.

Under the original English statutes for the examination of prisoners suspected of felony, material witnesses were not detained without first being given an opportunity to provide a recognizance or surety guaranteeing their appearance at trial. *See* 2 & 3 Phil. & Mar. c. 10, § 2 (1555) (Eng.) (justice of the peace had the authority to "bind all such by Recognizances or Obligation, as do declare anything material to prove the said Manslaughter or Felony, against such Prisoner . . . to appear at the next [sitting of the court] . . . to give evidence against the party . . . .").[2] Justices of the peace had no authority to detain material witnesses without first offering the witness the opportunity to swear an oath to appear at trial. *See id.* If the witness provided the oath, he could not be imprisoned. *See id.*; *see also*

[2] Notably, the Marian statute gave justices of the peace the express authority only to bind witnesses, not to imprison them. *See* 2 & 3 Phil. & Mar. c. 10, § 2.

JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 258 (1974) (describing the process of "binding over" material witnesses).

Early justice of the peace manuals describe the same limited powers. The offering of a recognizance (sworn oath) and reasonable surety (money promised to ensure appearance by the witness) were the accepted practices at common law. *See, e.g.*, WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF THE PEACE 205-06 (1581); MICHAEL DALTON, THE COUNTREY JUSTICE: CONTEYNING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 259 (1618) (justice of the peace shall "binde all such by Recognizance, as doe declare anything materiall, to proove the felony, to appeare at the next generall Gaole delivery, &c to give in evidence against such offenders"). These manuals from the sixteenth and seventeenth centuries contain no instructions to detain witnesses without offering them the opportunity to provide a recognizance or surety.[3]

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[3] During this time, justices of the peace were crown-appointed officers, tasked with "assisting the private prosecutor [the accuser] to build his case" against the accused. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 43, 46 (2003) ("LANGBEIN, ADVERSARY CRIMINAL TRIAL"). They sometimes helped to identify witnesses, and were required to bind them over to compel their appearance in trial court. *Id.* at 41. The justices of the peace used their "local influence" to investigate crime, encouraging complaining witnesses (victims) and other witnesses to come forward to build the prosecution's case. *See id.* at 46. The system, then, depended upon encouraging witnesses to cooperate in bringing and proving

The same practice continued in England into the eighteenth century. Justices of the peace were required to use the recognizance or surety process and could order a witness imprisoned only upon his refusal to provide the recognizance or surety. Imprisonment was viewed as an exercise of the court's contempt power. *See, e.g.*, THEODORE BARLOW, THE JUSTICE OF PEACE: A TREATISE CONTAINING THE POWER AND DUTY OF THAT MAGISTRATE 188 (1745); 1 JOSEPH SHAW, THE PRACTICAL JUSTICE OF PEACE AND PARISH AND WARD-OFFICER 317-18 (6th ed. 1756); 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 282 (George Wilson ed., new ed. 1778) ("[T]he justices or coroner that take . . . the information of the witnesses, may . . . before the trial bind over the witnesses to appear at the sessions, *and in case of their refusal either to come or to be bound over*, may commit them for their contempt on such refusal . . . .") (emphasis added);[4] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 163, 184 (6th ed. 1787) (noting that the Marian statutes provided justices of the

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charges. If victims and other witnesses had risked being jailed, they would have been reluctant to come forward.

[4] A person is said to be "bound over" when he enters into a bond or recognisance to the Crown to do or abstain from some act. On committal for trial on an indictable offence, the accused person, if he is granted bail, is bound over to appear and stand his trial, and the prosecutor and witnesses (except witnesses as to character) are bound over to appear and prosecute or give evidence, as the case may be . . . .

1 EARL JOWITT, THE DICTIONARY OF ENGLISH LAW 246 (1959).

peace with "authority to bind" witnesses to appear at trial "by recognizance or obligation" but omitting any mention of arrest or commitment of witnesses); *see also* LANGBEIN, ADVERSARY CRIMINAL TRIAL, *supra*, at 53 (noting that defendants requested "'a rule of court to make my witnesses appear'") (quoting *R. v. Fitzharris*, 8 St. Tr. 243, 330 (K.B. 1681)); *cf.* Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 90 n.73 (1974) (describing the power of English courts to compel the appearance of witnesses in treason trials).

English material-witness law on the eve of the American Revolution thus allowed a justice of the peace "to commit" a material witness "to the publick prison," if the witness "refuse[d] to be examined on oath" without "just cause," and to "bind over any such witness . . . by recognizance . . . to appear and give evidence." 30 Geo. 2, c. 24, § 16 (1757) (Eng.). Thus, the witness had to be given an opportunity to appear voluntarily and was brought before the justice of the peace only if he refused. *Id.* The witness was then afforded an opportunity to offer an oath to appear at trial. *Id.* Only if the witness refused to provide that oath could the witness be detained. *Id.*

B. Recognizances and Sureties Were Used to Ensure the Appearance of Material Witnesses in Colonial America.

Like other colonial laws, those governing material witnesses were generally holdovers from the English common-law tradition. Thus, the

colonists continued to use the recognizance or surety process to ensure the appearance of material witnesses at trial. *See, e.g.*, State of North Carolina, A Complete Revisal of All Acts of the Assembly, Of the Province of North-Carolina, Now in Force and Use, ch. 13, § 3, at 425 (1773) (describing a process of binding over witnesses through recognizance and surety); 3 Col. Laws N.Y., ch. 960, at 1007-08 (1754); JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 507-13 & n.99 (1944) (noting use of the preceding statute to bind over witnesses with recognizances, sometimes coupled with sureties or bonds); WILLIAM SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, OF HIS MAJESTY'S PROVINCE OF SOUTH CAROLINA 100 (1761) (describing a process of binding over witnesses through recognizance and surety); *cf.* 4 WILLIAM BLACKSTONE, COMMENTARIES 294 (1st Am. ed. 1772) (noting that the criminally accused had a broad right to bail following arrest in Founding-Era law); HAWKINS, *supra*, at 297 (a person involved in a crime who chose to confess and to turn crown witness against his confederates was "to be at his liberty, and out of prison" during the time before he was to "make his appeal" (testify against the others)). As in England in this era, material witnesses could not be detained unless they were first offered the opportunity to provide a recognizance or surety, and unless the witness refused to do so.

C. Early American Federal and State Material-Witness Laws Continued to Use Recognizances and Sureties to Procure the Testimony of Material Witnesses.

1. *The Judiciary Act of 1789*

The first federal material-witness statute was contained in the Judiciary Act of 1789, 1 Stat. 73-93, 91 (1789). The Act required that "copies of the process [against the offender] shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment." *Id.* Thus, imprisonment was a fallback, to be ordered only following a witness's refusal to provide a recognizance. This was consistent with the tradition of material-witness law that the Founders inherited. The 1789 Act did not even authorize the magistrate to require a surety with the recognizance.

Case law from the Founding Era confirms that detention was used only when witnesses refused to offer a recognizance or provide a reasonable surety. In *United States* v. *Moore*, the federal government jailed a group of sailors who had witnessed a homicide aboard a ship. 26 F. Cas. 1308, 1309 (C.C.D. Pa. 1801) (No. 15,805). In dicta, one of the judges wrote:

> It has been the practice in Pennsylvania to commit to prison such witnesses for the commonwealth as cannot find security for their appearance at court to testify, in cases where the justice does not think their personal recognizance sufficient; *but I find no authority for it.* By the statutes of 1 & 2 Phil. & M. c. 13 and 2 & 3 Phil. & M. c. 10, the justice has power to bind the witnesses by recognizance or obligation to testify, and if they refuse to be bound, to commit them for contempt. The same power is said to be virtually included in their commissions; but *it is no where said that they may be compelled to find security, or be committed.*

Id. at 1309 n.3 (emphases added). Thus even asking for a surety was considered improper; and detention could be imposed only when a witness refused to provide a recognizance, as an exercise of the contempt power.

The limited nature of this power to compel testimony from a material witness was noted in *Voss* v. *Luke*, a civil case that described the material witness process in criminal trials. 28 F. Cas. 1302, 1303 (C.C.D.C. 1806) (No. 17,014). The court noted that the recognizance process was not "compulsory" and that witnesses were free "to forfeit [their] recognizance[s] rather than attend." *Id.*

2. *State Material-Witness Laws*

Justice of the peace manuals from the Founding Era indicate that the lawful practice in the states was to imprison a witness only after he had refused to provide a recognizance or surety. *See, e.g.*, JAMES PARKER, CONDUCTOR GENERALIS 173, 303 (1788) (noting that "if the party shall refuse to be bound, the justice may send him to the gaol"); WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 149, 183 (1st ed. 1795) (stating that "[i]f a witness refuses to enter into a recognizance, he may be committed, or bound to good behaviour"; noting that "[i]n criminal cases, if a witness hath been bound over, and do not appear, he shall forfeit his recognizance," but making no mention of imprisonment in these circumstances); JOHN A. DUNLAP, THE NEW-YORK JUSTICE 7 (1815) (imprisonment was permissible only after a witness refused to provide an affidavit).

State-court case law from the Founding Era also indicates that a witness could be imprisoned only if he refused to swear a recognizance or provide a surety. In *Minor* v. *State*, a woman challenged her detention after she failed to provide a surety. 1 Blackf. 236, 237 n.1 (Ind. 1823). The court justified her incarceration on the ground that women were legally unable to provide a recognizance of their own, and the woman could be imprisoned if she was unable to find someone to post a surety on her behalf. *Id.*

When the Constitution and the Bill of Rights were ratified, the accepted practice for securing the testimony of material witnesses at trial was to require the witnesses to appear before a justice of the peace, or a similar official, to offer a recognizance or surety that they would appear to testify at trial. It was only when the witness refused to provide a recognizance or surety that the witness could be imprisoned.

D. In the Mid-Nineteenth Century, Federal and State Laws Continued to Authorize Imprisonment Only if a Witness Refused to Provide a Recognizance or Surety.

1. *Federal Material-Witness Law*

In the mid-nineteenth century, two federal statutes referred to the detention of material witnesses. One, addressing federal maritime jurisdiction, provided for the use of recognizances and sureties to secure witnesses who would testify on behalf of the accused; this is the first time a federal statute authorized the taking of sureties to secure a witness' attendance. Act of Aug. 23, 1842, 5 Stat. 517 (1842). The other, addressing the detention of material witnesses in federal criminal cases, permitted detention only for those witnesses who "neglect[ed]" or "refuse[d]" to provide a recognizance. Act of Aug. 8, 1846, 9 Stat. 72, 73-74 (1846). Detention was permitted only "until [the witness] shall have given the recognizance required by said judge," or until he testified. *Id.* at 74. Thus, a witness who was imprisoned for failure to recognize

could secure his release by agreeing to give his recognizance.

Federal laws regarding material witnesses did not materially change over the course of the nineteenth century in this regard.

2. *State Material-Witness Laws*

Nineteenth-century state cases and statutes also continued to follow the accepted rule of first affording the witness an opportunity to provide a recognizance or surety, and using detention only after instances of non-compliance. In *Bickley v. Commonwealth*, the Kentucky Court of Appeals granted a habeas petition on behalf of a witness who had been detained after failing to provide a $500 surety. 25 Ky. 572 (1829). The court noted that it had not "been able to find any statute which authorizes the circuit court, to compel witnesses to enter into recognizances with surety, and on their failure, to commit them to jail." *Id.* The *Bickley* court said the circuit court could have used a recognizance, but not a surety, to compel testimony. *Id.* The court therefore declared the witness's detention illegal. *Id. Cf.* Ill. Crim. Code ch. 38, § 364 (1874) (providing that "no . . . witness shall be required to give other security than his own recognizance for [his] appearance"). *See generally* Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681, 690-91 (2009) (discussing limits on the statutory power to detain material witnesses in late nineteenth-century Illinois).

In New York in the mid-nineteenth century, the applicable law continued to allow material witnesses to offer recognizances (and later bail) as a means of ensuring their appearance at trial. N.Y. Rev. Stat. pt. 4, tit. 2, §§ 21-22 (1829). The New York law allowed witnesses either to give their recognizance or to post a surety, at the discretion of the judge. *Id.* The extensive use of high bail amounts in New York, which often led to the imprisonment of witnesses, produced public outcry at this deviation from historical practice. *See, e.g., A Disgusted Hebrew*, N.Y. TIMES, Jan. 23, 1878, at 3 (reporting that witness-victim was required to put up $300 bail after he reported the theft of his own money totaling $35). Public concern about the hardship faced by indigent material witnesses who were held because they could not give sureties was expressed in other states, such as California and Illinois, as well. *See* Ramsey, *supra*, at 704.

While state material witness statutes sometimes were used to detain individuals who were suspected of criminal activity, the material-witness statutes upon which the police and magistrates relied did not deviate from the traditional law allowing witnesses to avoid imprisonment by offering a recognizance or bail. *See, e.g.*, N.Y. Rev. Stat. pt. 4, tit. 2, § 21; *see also* Ramsey, *supra*, at 690-92. Although, in practice, material witnesses were sometimes imprisoned without being offered the opportunity to post bail or give their recognizance, that practice contravened statutory authority. *See* Ramsey, *supra*, at 686-89, 692.

E. From the Reconstruction Era to the Mid-Twentieth Century, Material-Witness Laws Continued to Allow Witnesses to Make a Recognizance and Post Bail; and Those Laws Reflected an Understanding of the Requirements of Due Process.

During the Reconstruction Era and through 1944, the process of imprisoning a material witness only after either failure to give a recognizance, failure to provide a surety, or failure to abide by a recognizance, continued at both the federal and state levels. Some states expressly sought to reduce the hardship on poor witnesses by encouraging an alternative statutory procedure by which a witness might be deposed, instead of imprisoned, if he could not provide sureties. *See id.* at 692 & n.58 (discussing California law). Evidence at the federal and state levels indicates that failure to allow for the use of a recognizance or a surety, rather than imprisonment, was believed to be a departure from the common law and a violation of due process protections.

1. *Federal Material-Witness Law*

In 1878, Congress passed revised statutes that synthesized the 1789, 1842, and 1846 laws governing material witnesses. 1 Rev. Stat. 166, 166-67 (1878).[5]

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[5] The 1878 Revised Statutes were intended to be a codification of all Statutes at Large, including any laws passed after publication of the first edition. The act authorizing this codification provided that the President would appoint a

The statutes continued to allow for the imprisonment of a witness only if he refused to provide a recognizance or surety.

Section 879 of the 1878 law authorized a judge *sua sponte* to require a recognizance from a witness, with or without sureties, on behalf of the United States, or in cases arising under maritime jurisdiction, on behalf of any party. 1 Rev. Stat. 166, 166-67, § 879. Section 881 provided that the district attorney could request a judge to require a recognizance "with or without sureties" of a witness after proving that that testimony was competent and "necessary." The witness could be imprisoned only if he refused to provide the "recognizance required by said judge," and he could secure his release at any time by providing that recognizance. 1 Rev. Stat. 166, 167, § 881.

Debates over enactment of the Anti-Polygamy Act in 1887 reflected the late-nineteenth-century understanding of both the traditional limits on material-witness detentions and why the absence of such limits could raise constitutional concerns. The material-witness provision eventually enacted as part of the Anti-Polygamy Act provided that a witness in a polygamy or bigamy case could be immediately detained without use of a subpoena process, but could secure his "discharge" by

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commissioner to do the work, and the final product would be examined and approved by the Secretary of State. Act of Mar. 2, 1877, 19 Stat. 268 (1877). The commissioner had no authority to change the substance of the law. *Preface*, 1 Rev. Stat. v (1878).

providing a recognizance with surety. 24 Stat. 635 (1887).

The text of this provision changed over the course of congressional debate, mostly due to concerns about the constitutional implications of detaining a witness based solely on the oaths of the parties or upon the belief of the judge. An earlier provision included no requirement for an "oath or affirmation" of the reasonable grounds to believe the witness would not obey the subpoena. 17 CONG. REC. 513 (Jan. 7, 1886); 18 CONG. REC. 581 (Jan. 12, 1887). The same version required that no witness could be held in custody for longer than ten days. 17 CONG. REC. 513 (Jan. 7, 1886); 18 CONG. REC. 581 (Jan. 12, 1887). At the House conference, a requirement that the oath or affirmation be "of at least two credible persons in writing" was removed because "it being thought best to leave to the court the quantum of evidence necessary to show the unwillingness of a witness to appear." 18 CONG. REC. 1787 (Feb. 15, 1887).

During the debates over the Anti-Polygamy Act, several members of Congress expressed concern that allowing judges to detain witnesses based solely upon the oaths of other parties or a judge's belief would be unconstitutional and had never existed at common law. For example, Representative Bennett objected that the material-witness provision "invests the officers of the Territory with powers—and I have weighed the words—*such as no judicial officer ever possessed at common law.*" 18 CONG. REC. 1879 (Feb. 17, 1887) (statement of Rep. Bennett)

(emphasis added). He noted the importance of "safeguards in favor of the personal liberty of the citizen" and that "due proof" should be required of the "recusancy of the witness." *Id.*

Similarly, Senator Teller stated that "under this section, if the court should conclude that the witness may not appear, he may be arrested and held for ten days and no longer. . . . I know there is a similar statute in the States with reference to the holding of witnesses to bail, but I know that is a *dangerous power to put in the hands of anybody at any time*, much less in such states of excitement as will and must necessarily exist in the execution of these laws." 17 CONG. REC. 513 (Jan. 7, 1886) (statement of Sen. Teller) (emphasis added).

Senator Call also questioned the constitutionality of the Anti-Polygamy Act's material-witness provision. He argued that allowing witnesses to be imprisoned solely on the basis of a judge's belief would be a "violation of the right of personal liberty guaranteed in the Constitution, the right to be free except under due and proper process of law . . . ." 18 CONG. REC. 1900 (Feb. 18, 1887) (statement of Sen. Call).

Defenders of the provision clarified that the absence of a subpoena process would not result in the witness's immediate imprisonment, but would merely bring him before the court, which would then take the witness's recognizance. Representative Hammond stated that the "whole purpose is that if a witness is needed immediately he shall be brought

immediately before the court, and then, if the cause is continued or laid over for a day, the court will take his recognizance for his appearance when required." 18 CONG. REC. 1881 (Feb. 17, 1887) (statement of Rep. Hammond).

Until 1948, two federal criminal statutory provisions authorized the arrest of material witnesses in non-polygamy cases. One authorized judges or other officers to "require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case." 28 U.S.C. § 657 (1940) (repealed 1948). The other authorized the district attorney to request the arrest, recognizance and potential imprisonment of a witness. 28 U.S.C. § 659 (1940) (repealed 1948). Neither provision, however, authorized the imprisonment of a material witness without the use of a recognizance or the availability of bail. As before, the statute made clear that detention was authorized only "until [the witness] gives the recognizance required by said judge." *Id.*

In 1944, Congress passed Rule 46 of the Federal Rules of Criminal Procedure. The Advisory Committee Notes stated that Rule 46(b) was considered "substantially a restatement of 28 U.S.C. § 657." Fed. R. Crim. P. 46 advisory committee's notes (1944). The rule itself provided no power to detain material witnesses. Thus, between 1948 (when former § 657 and § 659 were repealed) and 1966 (when Congress enacted the Bail Reform Act), there may have existed "no formal authority to

arrest material witnesses because the newly enacted Federal Rules of Criminal Procedure did not mention such arrests." Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 491 (2002).

2. *State Material-Witness Laws*

State case law concerning material-witness detentions from Reconstruction through the mid-twentieth century reflected the view that imprisoning a witness without giving him the alternative of providing a recognizance or surety violated the common law and due process. State courts variously imposed limitations on the government's authority to detain material witnesses, to require unreasonable sureties, and to detain witnesses for unreasonable periods of time. *See, e.g.*, *State* v. *Grace*, 18 Minn. 398 (1872) (releasing detained witnesses on writ of habeas corpus because there was no finding that the witnesses had "any intention of not appearing"); *Ex Parte Shaw*, 61 Cal. 58 (1882) (releasing a material witness who had not been offered an opportunity to provide a recognizance); *Howard* v. *Beaver County*, 6 Pa. C.C. 397 (1889) (noting that magistrate was required to find that witness did not intend to appear before detaining the witness); *Hall* v. *Commissioners*, 34 A. 771, 772 (Md. 1896) (witness could be detained only "after [he] fails to give such reasonable security for his appearance as may be demanded of him"); *People* v. *Pettit*, 44 N.Y.S. 256 (Sup. Ct. 1897) (recognizance was sufficient to prevent detention); *In*

re Yasutaro, 15 Haw. 667 (1904) (releasing witnesses on writ of habeas corpus after prosecution sought to detain them during appeals process); *Ex parte Grissett*, 149 P. 1195 (Okla. Crim. App. 1915) (recognizance was sufficient when witnesses were unable to pay surety); *Ex parte Grzyeskowiak*, 255 N.W. 359, 361 (Mich. 1934) (finding a four-month detention period unreasonable and releasing witness); *Lowe* v. *Taylor*, 180 S.E. 223, 226 (Ga. 1934) ("No court should ever order a witness to be imprisoned . . . except from grave necessity.").

F. Material-Witness Laws Since 1966 Are Based on an Incorrect Understanding of Material-Witness Precedents.

Only since the late twentieth century has federal law allowed the arrest and detention of a material witness without first issuing a subpoena and then allowing the witness to provide a recognizance or surety as an alternative to detention. This is a departure from the law during the Founding and Reconstruction Eras, as well as at common law.

1. The 1966 amendment to Rule 46 of the Rules of Criminal Procedure continued to reflect Congress's intent to avoid the unnecessary detention of material witnesses. The amendment added subdivision (h), which provided that "[t]he court shall exercise supervision over the detention of defendants and witnesses within the district pending trial *for the purpose of eliminating all unnecessary*

detention." Fed. R. Crim. P. 46(h) (1966) (emphasis added). The Advisory Committee Notes reflect this intent, stating that the purpose of the Amendment is "to place upon the court in each district the responsibility for supervising the detention of defendants and witnesses and for *eliminating all unnecessary detention*." *Id.* advisory committee's note (1966) (emphasis added).

In June 1966, Congress departed from centuries of prior precedent when it enacted the Bail Reform Act of 1966, 18 U.S.C. §§ 3146-52, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984). The stated purpose of the Act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not be needlessly detained[.]" 80 Stat. 214. In spite of this salutary purpose, the material-witness provision of the Act made no mention of recognizances, sureties, or even bail. This was the first time a federal statute had authorized detention not expressly conditioned upon the witness's refusal or failure to provide assurances for his appearance. Despite the lack of these explicit provisions, statements made during consideration of the Act suggest that Congress maintained the view that material witnesses should be detained only in exceptional cases. As Deputy Attorney General Ramsey Clark stated, the material-witness provision "puts much greater emphasis on release. . . . Congress feels that you should ordinarily not detain material witnesses. They have committed no crime, except to have been at the wrong place at the wrong time. . . ." *Federal Bail Reform: Hearings Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th

Cong. 29 (1966) (statement of Ramsey Clark, Deputy Attorney General). He further noted that federal material witnesses were committed "fairly infrequent[ly]," and often "primarily for the protection of the witness himself," as in cases involving organized crime. *Id.* at 30.

2. A decision of the Ninth Circuit in 1971 changed the federal process. It allowed the detention of a witness without first attempting to secure her testimony by subpoena, based largely on the incorrect view that such a detention not only was constitutional but was a historically accepted practice. *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971). The *Bacon* court relied upon a fundamental misinterpretation of the 1789 Judiciary Act, and subsequent federal legislation, in support of its conclusion that the Founding Fathers authorized the arrest and detention of material witnesses in the first instance. The court ignored the fact that the Judiciary Act of 1789, and subsequent federal legislation, authorized only the taking of recognizances from witnesses, and the possibility of imprisonment only after the failure to give a recognizance. In *Bacon*, bail was set for the witness at $100,000, even though the Judiciary Act of 1789, and subsequent federal legislation, had not authorized the setting of bail. The court failed to acknowledge the essential distinction between detaining a witness who refused to promise to appear in court, or reneged on his promise (making imprisonment an exercise of the court's contempt power), and detaining a witness who promised to appear in court. *See id.* at 938 (stating that

Congress had not intended the Bail Reform Act to abandon the "long-standing authority to arrest material witnesses" that began with the Judiciary Act of 1789); *see also* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 706-13 (2005). Instead, the court conflated the immediate, unconditional detention of a material witness with the power to subpoena a material witness who would then be asked to provide a recognizance or sureties, and would face detention only upon refusal to do so.

Relying on Federal Rule of Criminal Procedure 46(b) and now-former § 3149, the *Bacon* court misinterpreted historical precedent to find an implied right to imprison material witnesses. Both authorities, however, merely provided that if a person could provide testimony material to a criminal proceeding and could not practicably be served by subpoena, a court could require a person to give bail for his appearance. *See Bacon*, 449 F.2d at 937. To find an implied right, the court mistakenly concluded that the power to arrest "was expressly provided for by statute until 1948." *Id.* at 938. However, in neither the Founding Era nor the Reconstruction Era could a witness legally have been imprisoned without first being given the opportunity to provide a recognizance or surety. Each version of the material-witness law before *Bacon* expressly limited judicial authority to imprison a witness to instances in which he willfully refused to promise to appear. Any other policy would have been a sharp

deviation from the common law and statutory authority.

In addition to its mistaken interpretation of historical precedent, the Ninth Circuit also redefined "probable cause" for arrest and detention under a material-witness arrest warrant. *Id.* at 942. The court relied on Rule 46(b) and § 3149 to hold that an arrest of a material witness is "reasonable" upon a showing of two statutory criteria: (1) "that the testimony of a person is material" and (2) "that it may become impracticable to secure his presence by subpoena." *Id.* at 943. The *Bacon* court removed the substantive standard of "probable cause" to arrest based on a reasonable belief of guilt or criminal activity, *see, e.g., Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949), and substituted two statutory conditions far short of criminal wrongdoing to justify the arrest and detention of a material witness even when he or she has *not* refused to testify.

The Ninth Circuit's decision in *Bacon* thus deviated from historical precedent and from Fourth Amendment requirements. Congress and the federal courts have since relied on *Bacon* to presume the constitutionality of detaining material witnesses without recognizance, sureties, or bail. That single, historically incorrect decision had a "singularly far-reaching influence on the acceptance of 'material witness' detentions." Bascuas, *supra*, at 704.

3. Congress explicitly relied on *Bacon* in passing the Bail Reform Act of 1984, which is the current material-witness statute. Section 3144 provides that "if it is shown that it may become

impracticable to secure the presence of a person by subpoena, a judicial officer may order the arrest of the person. . . ." 18 U.S.C. § 3144. The legislative history of § 3144 cites *Bacon* as the exclusive legal authority for the statute:

> [T]he Ninth Circuit found the power to arrest a material witness to be implied in the grant of authority to release him on conditions under 18 U.S.C. § 3149. In its research on the law, the court discovered that specific arrest authority existed in federal law from 1790 to 1948. The court concluded that the dropping of the authority in the 1948 revision of federal criminal laws was inadvertent. The committee agrees with that conclusion and expressly approves the finding of the implied right to arrest in the authority granted to the judicial officer to release on conditions that is set forth in 18 U.S.C. § 3149.

S. REP. NO. 98-225, at 28-29 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3211-12.

Both *Bacon* and § 3144 misinterpreted the statutory authority from the Founding Era through the mid-twentieth century. Those laws authorized the detention of a witness only when the witness failed to provide a recognizance or surety. Moreover, the historical record after the Founding Era contains ample evidence that the provision of alternatives to

detention to secure a witness's testimony, in the form of recognizances, sureties, and bail, were considered necessary to ensure that such practices would comport with due process.

II. HISTORICALLY, PROSECUTORS HAVE NOT HAD ABSOLUTE IMMUNITY FROM CLAIMS OF WRONGFUL IMPRISONMENT OR FOR ABUSING THE WITNESS-DETENTION PROCESS.

This Court has declined to find absolute immunity for actions that did not enjoy such immunity from tort suits "at common law when the Civil Rights Act was enacted in 1871." *Malley*, 475 U.S. at 340 (quoting *Tower* v. *Glover*, 467 U.S. 914, 920 (1984)). As the Court explained in *Malley*, "[o]ur initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." *Id.* at 339-40.[6]

At common law, prosecutors and others who played a prosecutorial role were not immune from wrongful imprisonment suits based on actions taken for improper reasons. Jailing someone as a "material witness" without a real intention to have him testify would qualify as such a reason.

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[6] And even if "an official was accorded immunity from tort actions at common law," immunity can still be denied. *Malley*, 475 U.S. at 340.

A. The Common Law of False Imprisonment Allowed Tort Suits Against Justices of the Peace Who Imprisoned Individuals for Impermissible Reasons.

The role of the English justice of the peace in the seventeenth to nineteenth centuries was not what it is today in the United States. English criminal prosecutions, especially early in this era, were conducted without the reliance on counsel that eventually became more typical in American practice. England moved to a more adversarial process over the course of the eighteenth century. *See generally* LANGBEIN, ADVERSARY CRIMINAL TRIAL, *supra* (explaining the transition from an inquisitorial criminal trial system to the modern adversarial model). Private parties would initiate private prosecutions on criminal charges, and justices of the peace were responsible for conducting investigations and ensuring that the parties and witnesses appeared at trial before the higher court. *See generally* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEG. HIST. 313, 317-24 (1973). In this sense, justices of the peace acted as "back-up prosecutors." *Id.* at 323.

English justices of the peace could be held liable for tortious acts committed in the process of conducting this type of investigation, including the wrongful binding over of witnesses. Justices of the peace did not enjoy the immunity afforded to judges for erroneous acts. *See* 21 Jac. I c. 12 (1623-24) (Eng.) (permitting justices of the peace and other

officers to plead the general issue (a general denial rather than a specific defense) in answer to false-imprisonment actions brought against them, thus confirming that such liability existed).

There is extensive English case law holding that justices of the peace and other ministerial officers could be sued for false imprisonment. *See, e.g.*, *Casbourn* v. *Ball*, 96 Eng. Rep. 507 (C.P. 1773); *Hill* v. *Bateman*, 93 Eng. Rep. 800 (K.B. 1725) .

Evans v. *Rees* is a classic example of a case where a justice of the peace was found liable in trespass for the detention of a material witness. 113 Eng. Rep. 732, 734 (K.B. 1840). There, a warrant had issued to detain a witness, based on other parties' statements that the witness said he would not appear at trial. *Id.* at 733. The witness was not given the opportunity to provide a recognizance. *Id.* at 734. The court held that it was improper for the justice of the peace to detain a witness based on the testimony of others and the justice of the peace could be held liable for damages for the imprisonment. *See id.* at 734-35; *see also id.* at 733-34 (Lord Denman, C.J., quoting D'Oyly & Williams's edition of Burn's *Justice of the Peace*: "'The practice of committing witnesses unable to find sureties for their appearance is clearly repugnant to every principle of the English law'"). Justices of the peace exercised only limited statutory authority to detain witnesses and even the accused, and when they acted contrary to statute, they could be held liable. Even when acting within their office, justices of the peace could be held liable in tort for malicious or corrupt action.

See, e.g., Justices' Protection Act (Jervis Act), 1848, 11 & 12 Vict. c. 44 (Eng.) (providing that an action on the case lies against a justice for malicious actions taken in the execution of his duties as justice); HAWKINS, *supra*, at 133.

B. Historically, the Intentions of Public Officials Have Been Important Considerations in Deciding Whether an Official Is Entitled to Immunity.

Both before and after 1871, justices of the peace in the United States have been held liable for the improper detention of witnesses. In *Marsh* v. *Williams*, for example, a witness was compelled to testify by subpoena, but failed to do so. 1 Howard 132 (Miss. 1834). The court found that the commissioner in chancery had no power to detain the witness even though he had refused to testify; that to do so would be illegal; and that all involved in such an imprisonment would be liable as trespassers. *Id.*

In *Bates* v. *Kitchel*, a justice of the peace imprisoned a witness who could not make bail for his failure to post bail, and the witness sued the party who urged his commitment for false imprisonment. 160 Mich. 402, 403-04 (1910). The court found in favor of the witness, holding that the party was liable because the justice of the peace, too, would have been liable for committing the witness: stating that "[u]nder the terms of the [Michigan witness] statute, neither the commissioner nor the justice had any jurisdiction for imprisoning the defendant, and

in attempting to do so they were . . . clearly acting outside of their jurisdiction." *Id.* at 408.

A pair of Massachusetts cases similarly allowed for liability for false imprisonment of witnesses who had been wrongfully detained in contempt proceedings. *See Clarke* v. *May*, 68 Mass. 410, 412 (1854) (holding that a justice of the peace was liable for the detention of a witness where trial had ended); *Piper* v. *Pearson*, 68 Mass. 120, 122-23 (1854) (holding that a justice of the peace who, in the course of the trial in a case of which a local police court had exclusive jurisdiction by statute, committed a witness to prison for contempt was liable to an action by the witness). While both of these suits arose out of civil trials, they state the general principle that justices of the peace, when not acting in strict compliance with statute, could be sued for damages. *See also Call* v. *Pike*, 66 Me. 350 (1876) (justice of the peace was liable in trespass for committing a witness who refused to be sworn for a deposition; justice was related to one of the parties in the pending suit, and so was statutorily disqualified from examining the witness); *Grumon* v. *Raymond*, 1 Conn. 40 (1814) (justice of the peace who detained suspects in a stolen-property case by issuing an arrest warrant that did not name any particular party was liable to arrestee); *Johnson* v. *Tompkins*, 13 F. Cas. 840, 854 (C.C.E.D. Pa. 1833) (No. 7,416) ("If an illegal act is done under colour of legal authority or process, from an officer who had no jurisdiction of the subject matter, or whose order or process is made or issued in violation of the law, the judge or justice, and party procuring it, are

trespassers, so is the officer and all who act under him . . . ."); *Robinson* v. *Dow*, 20 F. Cas. 1005 (C.C.D.C. 1846) (No. 11,950) (issuing an arrest warrant outside of his territorial jurisdiction would expose a justice of the peace to tort liability). As these cases demonstrate, justices of the peace were subject to strict statutory constraints on their powers with respect to witnesses and parties, and if they acted contrary to the terms of the authorizing statute, they could be held liable.

Additionally, when justices of the peace issued summonses, bound individuals over for trial, or took other non-adjudicatory actions against witnesses or parties, they were liable if they acted maliciously or from corrupt motives. *See, e.g.*, *Head* v. *Levy*, 52 Neb. 456 (1897) (justice of the peace who issued an order of attachment against plaintiff without first requiring the complaining witness to execute an undertaking, and who maliciously summoned additional witnesses specifically for the purpose of increasing the plaintiff's court fees, was liable for damages); *Fisher* v. *Deane*, 107 Mass. 118, 121 (1871) (justice of the peace who maliciously arrested plaintiff on a post-judgment execution warrant was liable, and plaintiff properly presented "evidence . . . that the warrant was issued for a corrupt and dishonest purpose, namely, to extort money from him, and under a threat to make trouble for him if he did not pay the money demanded"); *see also Chambers* v. *Oehler*, 104 Iowa 278 (1897) (allowing lawsuit to proceed against a justice of the peace who allegedly "malicious[ly] . . . and for the purpose of oppressing and annoying the plaintiff, and to extort

money from him" arrested a witness for disobeying a subpoena; not questioning whether the complaint stated a cause of action against the justice or other defendants).

Private litigants, too, could be held liable for their role in actions taken against witnesses. Such liability could be based on trespass or false imprisonment, as in *Bates* v. *Kitchel*, 160 Mich. 402, and *Marsh* v. *Williams*, 1 Howard 132. *See also Lovick* v. *Atl. Coast Line R.R.*, 129 N.C. 427 (1901) (upholding jury verdict in favor of plaintiff in suit against private company for its role in procuring the arrest of a witness). Liability could also be based on malicious abuse of process, whenever process is "willfully made use of for a purpose not justified by the law."[7] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 220 (2d ed. 1888). A New York case, *Dishaw* v. *Wadleigh*, 44 N.Y.S. 207 (N.Y. App. Div. 1897), involved a malicious abuse of process claim for issuing a subpoena under false pretenses. There, the plaintiff had been subpoenaed, ostensibly to obtain his testimony, but in fact to get

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[7] At the time of the passage of the Civil Rights Act of 1871, many prosecutions were brought by private individuals. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43 (1995). These private prosecutors could be held liable for malicious prosecution, but were protected by a probable-cause defense. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 107-15. Absolute prosecutorial immunity is a more recent development, first appearing in case law in 1896. *Id.* at 55 n.14; *Griffith* v. *Slinkard*, 44 N.E. 1001, 1002 (Ind. 1896).

him to pay an outstanding debt. *Id.* The court described the use of the subpoena process in this manner as having been "sought by trickery and cunning to pervert the processes of the law from their proper use and design, in order to reach a result which it was thought could not be arrived at by ordinary and legitimate procedure of the courts." *Id.* at 209. The court considered it proper, therefore, to look beyond the stated reasons for the subpoena, even if they appeared to be legitimate, to inquire into the real purpose of the party requesting the subpoena. *Id.* at 210.

Thus, questions of statutory authorization and intent historically were important elements in the inquiry whether a public official or private litigant could be liable in tort. Courts recognized liability for a range of traditional tort claims that could be brought by a witness who allegedly had been improperly detained (including trespass, malicious prosecution, malicious abuse of process, and false imprisonment).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 28, 2011

AMICUS CURIAE BRIEF

(13)

No. 10-98

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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STATEMENT OF INTEREST[1]

Amici curiae are professors of criminal procedure, civil rights, and constitutional law. They teach, study, and write about the official immunity doctrines. *Amici* have a particular interest and expertise in the doctrine of absolute immunity, the subject of the first question presented by the petition in this case. Specifically:

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

immunity, as well as issues of civil liberties and national security in the war on terror.

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Amici do not represent the views of their universities and join this brief solely on their own behalf.

SUMMARY OF ARGUMENT

Petitioner is not entitled to absolute immunity from suit over his policy of using material witness warrants as pretexts to investigate and detain terrorism suspects. Nothing about this case justifies a departure from this Court's well-established presumption that qualified – rather than absolute – immunity adequately protects public officials while preserving for victims of civil rights violations a remedy for legitimate constitutional grievances. Petitioner therefore bears a heavy burden of showing that the need for the marginal additional protections made available by absolute immunity justifies the foreclosure of any remedy for violations of an individual plaintiff's constitutional rights.

Since its decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court has made clear that prosecutors are entitled to absolute immunity from suit only for actions that are so closely associated with the judicial process that the need to prohibit suits to preserve the independence of the judiciary justifies the resulting infringement on individual rights. In its analysis, this Court has examined both whether immunity was available at common law and whether the function served by the activity at issue is so closely related to the judicial process that the need to ensure that public officials pursue their duties without undue interference outweighs the need to provide judicial remedies for civil rights abuses. In this case, none of these factors counsels in favor of extending absolute immunity to petitioner for his material witness policy.

First, extending absolute immunity to a prosecutor's use of a material witness warrant finds no support in the common law. Petitioner does not even attempt to establish a common law tradition of prosecutorial immunity for detaining criminal suspects for investigation or preventative detention without probable cause.

Second, the use of a material witness warrant as a pretext to detain a suspect for questioning is an "investigative," rather than "quasi-judicial," function and is therefore entitled only to qualified immunity. This Court has extended absolute immunity to prosecutors only to the extent that their actions are integral to the judicial process. In making this determination, this Court can and should look at all objective indicia of the function performed by the challenged action. In this case, the circumstances of respondent's detention – its proximity (or lack thereof) to the trial at which he was purportedly needed to testify, the Government's failure to actually call him as a witness, the substance of the Government's interrogations, the length of his detention, and the manner in which he was treated – all lead to the conclusion that the Government relied on the material witness warrant to fulfill an investigative function.

Additionally, petitioner fails to show that the policy considerations underlying this Court's absolute immunity doctrine counsel in favor of absolute immunity for the pretextual use of a material witness warrant. The threat to individual liberty inherent in providing public officials with absolute immunity from civil rights actions is exacerbated in cases, like this one, involving a policy that allows investigative

detentions without probable cause and deprives those subjected to it of the safeguards they would enjoy as either bona fide witnesses or criminal defendants. Nor is absolute immunity justified by the need to insulate the judicial system from the specter of officials' personal liability: qualified immunity can shield government officials such as petitioner from meritless litigation, without chilling the ability of law enforcement agents and prosecutors to respond to genuine threats against the United States.

ARGUMENT

I. Qualified, Rather Than Absolute, Immunity Is The Correct Framework For Reviewing Executive Decision-Making.

This Court has long assumed that "qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). Accordingly, a public official seeking absolute immunity bears the substantial burden of showing that the "public interest in encouraging the vigorous exercise of official authority" outweighs the interest in holding "liable the official who knows or should know he is acting outside the law." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

A. Qualified Immunity Provides Ample Protection For Discretionary Decision-Making.

"In most cases, qualified immunity is sufficient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official

authority." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (citation and quotation marks omitted).

Qualified immunity shields conduct that, as an objective matter, "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Burns*, 500 U.S. at 495 n.8. As this Court has emphasized, this standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). By allowing civil rights plaintiffs to seek damages for willful and egregious statutory or constitutional violations but precluding suits involving "close calls," qualified immunity strikes the right balance between policies of preserving the exercise of discretion by public decision-makers while discouraging abuses of authority.

In addition to the high substantive bar that must be met to overcome qualified immunity, stringent procedural requirements also protect public officials from vexatious litigation. At the pleading stage, for example, a defendant will be entitled to qualified immunity – thereby allowing frivolous claims to be dismissed prior to discovery – unless a *Bivens* plaintiff can make a plausible claim that the defendant has committed a clear constitutional violation. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 558-60 (2007). Indeed, pleading requirements alone have proven effective in precluding suit against public officials such as petitioner. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Moreover, even if a suit against a government official survives a motion to dismiss on

qualified immunity grounds, the defendant may immediately appeal that judgment. *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996). During this delay, civil rights defendants will not be subject to discovery. *Iqbal*, 129 S. Ct. at 1953-54.

Thus, qualified immunity by itself is ordinarily sufficient to "satisf[y] one of the principal concerns underlying . . . absolute immunity[,]" namely to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," *Burns*, 500 U.S. at 495 n.8 (citations omitted); *see Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.").

B. The Social Cost Of Absolute Immunity Is High.

Absolute immunity is the uncommon exception in U.S. law both because it is rarely needed to effectively protect official decision-making and because its costs to individuals and society are high.

1. Because qualified immunity already protects all but egregiously incompetent conduct or willful violations of the law, extending absolute immunity to any particular category of conduct risks immunizing egregious abuses of constitutionally protected rights from judicial scrutiny. Indeed, the Court's prior absolute immunity decisions illustrate the high social costs, and frequent injustice, that absolute immunity in other contexts can cause. For example, in *Stump v. Sparkman*, 435 U.S. 349 (1978), this Court held that absolute immunity precluded a suit against a

judge despite undisputed allegations that he ordered the surgical sterilization of a fifteen-year-old girl without her knowledge or consent. Likewise, in *Mireles v. Waco*, 502 U.S. 9 (1991), absolute immunity barred a suit arising out of an incident in which a judge ordered police officers "to forcibly and with excessive force seize and bring" to the courtroom a public defender who was tardy for a hearing. *Id.* at 10 (citation and quotation marks omitted).

The risks of leaving constitutional violations unremedied may have especially severe consequences in *Bivens* actions, which – as this Court has long recognized – serve as an important last line of defense for individual liberties. For a citizen who has already suffered constitutional injury at the hands of a federal official, "[t]he barrier of sovereign immunity is frequently impenetrable[,]" and "[i]njunctive or declaratory relief is useless . . . . 'For people in Bivens' shoes, it is damages or nothing.'" *Butz*, 438 U.S. at 504-05 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

The risks and social costs of extending absolute immunity to prosecutors are just as great. For example, in *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1999), absolute immunity precluded a suit against a prosecutor accused of conspiring with local politicians to bring malicious charges and run an elected sheriff out of office. Absolute prosecutorial immunity not only may create grave injustices to particular victims of unconstitutional prosecutorial conduct, but it may also even *distort* the judicial process it aims to uphold. For example, in *Burns*, 500 U.S. at 492, this Court held that the need to protect prosecutorial

discretion justified absolute immunity for a prosecutor who concealed from a judge material information regarding a suspect's confession.

To be sure, in such cases the Court has determined that the cost of absolute immunity was justified by tradition and the countervailing need to protect the free functioning of the judicial system. But the Court has not ignored the social costs of absolute immunity and has, in fact, taken care not to extend the tradition of absolute judicial immunity to all aspects of a prosecutor's activities related to preparing for, and bringing, a case to trial. Thus, prosecutors do not receive absolute immunity against allegations either that they have fabricated evidence, *Buckley*, 509 U.S. at 275, or that they have submitted false sworn affidavits, *Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997).

Thus, although the Court has extended absolute immunity to some prosecutorial conduct, it has done so cautiously, recognizing that ordinarily qualified immunity is sufficient to ensure zealous execution of prosecutor's important public duties, just as it does for other law enforcement officers.

II. Absolute Immunity Does Not Extend To A Policy of Detaining U.S. Citizens Without Probable Cause For Investigative Or Preventative Purposes.

Given the small marginal benefits served by absolute immunity, this Court rarely has departed from its presumption that qualified, rather than absolute, immunity is sufficient to protect executive officials. It has instead honored the balance of competing policies struck by the common law: in

Section 1983 suits and *Bivens* actions, the Court has accorded absolute immunity to conduct that had historically been immune from suit. *E.g., Pierson v. Ray*, 386 U.S. 547 (1967). In light of that history, the Court has extended absolute immunity only to prosecutorial functions that are intimately connected to the judicial activities that received absolute immunity at common law. *Burns*, 500 U.S. at 490-92; *Buckley*, 509 U.S. at 268-70.

Against this background, petitioner is not entitled to absolute immunity for his policy of systematically using material witness warrants to investigate and detain without probable cause U.S. citizens suspected of terrorist activities. First, the common law reveals no tradition of absolute immunity for officials seeking the arrest of trial witnesses, much less pretextual arrests for preventative detention or investigation. Second, the objective evidence indicates that the function served by petitioner's challenged policy was the investigation of criminal suspects, a function that falls outside the scope of absolute prosecutorial immunity under this Court's precedents. Finally, the policy considerations that underlie the extension of absolute immunity in rare cases do not support providing petitioner an unprecedented immunity here.

A. Prosecutors Did Not Enjoy Absolute Immunity At Common Law For Securing The Arrest Of Material Witnesses, Much Less For Pretextual Arrests Of Suspects For Investigation Or Preventative Detention.

Creating defenses to liability is a legislative, not a judicial, function. Accordingly, this Court has never claimed any general authority to develop immunity doctrines as a matter of "freewheeling policy choice." *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); *see, e.g., Tower v. Glover*, 467 U.S. 914, 922-23 (1984) ("We do not have a license to establish immunities . . . in the interests of what we judge to be sound public policy."). Instead, the Court has justified its recognition of legislatively unmentioned defenses to civil rights actions on the presumption that Congress intends to preserve traditional immunities accorded to relevant officials as they existed under the common law. *See, e.g., Buckley*, 509 U.S. at 268; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Petitioner identifies no common law tradition under which he could claim absolute immunity from the allegations in this case.

As of 1871,[2] courts recognized absolute immunity only for those activities inherent to the operation of

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[2] Because immunity questions ordinarily arise with respect to claims under 42 U.S.C. § 1983, the Court has examined the state of the common law in 1871, the year in which Section 1983 was enacted. *See, e.g., Buckley*, 509 U.S. at 268. Although this case is brought pursuant to the cause of action recognized in

judicial proceedings. Thus, judges and grand jurors enjoyed absolute immunity from civil suits arising from their adjudicatory duties. *See, e.g., Imbler*, 424 U.S. at 423; *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). Likewise, "all statements made in the course of a court proceeding were absolutely privileged against suits for defamation." *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part) (citation omitted).

But while common law courts recognized judicial immunity as absolute, *Pierson*, 386 U.S. at 553-54, prosecutors did not enjoy similar protections, *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). In 1871, the office of public prosecutor in its modern form was not common. *See id.* at 125 n.11. However, where it existed, and when others performed similar functions, prosecutors were entitled only to the qualified immunity extended to "official acts [of government servants] involving policy discretion but not consisting of adjudication." *Burns*, 500 U.S. at 500 (Scalia, J., concurring in the judgment in part and dissenting in part) (citation omitted).

In the years after 1871, courts expanded the scope of absolute immunity to include some prosecutorial actions performed by public prosecutors. In *Griffith v. Slinkard*, 146 Ind. 117 (1896), the Indiana Supreme Court held that a district attorney – much like a grand jury – was absolutely immune from a suit alleging that he had

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Bivens, this Court has applied the same immunity standards under Section 1983 and *Bivens*. *Butz*, 438 U.S. at 504.

maliciously and without probable cause contrived to have the plaintiff indicted. And relying on this "common-law immunity that first came into existence 25 years after § 1983 was enacted," *Smith v. Wade*, 461 U.S. 30, 34 n.2 (1983), this Court summarily upheld a Second Circuit decision holding that the "reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor . . . ." *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927).

However, prosecutorial immunity did not evolve into a comprehensive shield against all lawsuits, even with respect to in-court activities. Instead, courts generally limited prosecutorial immunity to malicious prosecution and defamation actions. *Imbler*, 424 U.S. at 437-39 (White, J., concurring in the judgment). For example, there was not "any post-1871 tradition to support prosecutorial immunity in the obtaining of search warrants." *Burns*, 500 U.S. at 506 n.2 (Scalia, J., concurring in the judgment in part and dissenting in part). Nor was absolute immunity afforded to the performance of police functions, such as arrest or imprisonment, *Pierson*, 386 U.S. at 557, or to investigative or administrative activities for which other law enforcement officials would not be absolutely immune from suit, *see Burns*, 500 U.S. at 483 n.2; *see also Kalina*, 522 U.S. at 126.

Similarly, although the government's statutory authority to arrest and detain material witnesses dates back to 1789, *see* Resp. Br. 26-29, there was no tradition of holding the officials conducting such arrests absolutely immune from suit for false arrest. *See Malley*, 475 U.S. at 344-45 (holding that police

officer seeking an arrest warrant was not entitled to absolute immunity).

It should come as no surprise, then, that petitioner identifies (and *amici* are aware of) no common law authority affording absolute immunity to prosecutors for unlawfully securing the arrest of a material witness, or for pretextually detaining suspects, without probable cause, for investigation or preventative detention.

B. Law Enforcement Officials Do Not Engage In A Prosecutorial Function When Securing The Arrest Of A Suspect For Investigative Or Preventative Purposes.

Petitioner argues that even if there is no specific tradition of absolute immunity for prosecutors who unlawfully secure the arrest of a witness for investigation or preventative detention, his conduct nonetheless falls within the scope of "his prosecutorial duties," Petr. Br. 14 (quoting *Imbler*, 424 U.S. at 420), and therefore should be afforded absolute immunity. That argument fails as well. Even if the Court's "functional approach" could yield an immunity more expansive than that recognized at common law, it does not do so here.

As relevant here, this Court has extended absolute immunity to prosecutorial conduct that is "intimately associated with the judicial phase of the criminal process," when such an extension is necessary to support the common law's policy of protecting judicial independence. *Imbler*, 424 U.S. at 430. At the same time, the Court has refused to extend absolute immunity to prosecutors when they

perform investigatory or administrative functions that are not intimately associated with the judicial process. *Buckley*, 509 U.S. at 270 (citing *Imbler*, 424 U.S. at 431 n.33).

In this case, respondent alleges that he was detained on a material witness warrant not to ensure his availability as a witness at trial, but to facilitate the FBI's investigation of him as a suspect and to prevent him from engaging in acts of terrorism during a time in which the FBI had no probable cause to believe that he had engaged in prior unlawful acts or was about to engage in acts of terrorism. This Court has previously held that a prosecutor does not engage in prosecutorial functions subject to absolute immunity when he assists in a criminal investigation or undertakes national security functions. *See, e.g.*, *Burns*, 500 U.S. at 493; *Mitchell*, 472 U.S. at 524. Accordingly, there is little ground to dispute that if respondent had been detained pursuant to a statute that only authorized investigative or preventative detention, his claims would be subject to a defense of qualified, rather than absolute, immunity. *See, e.g.*, *Buckley*, 509 U.S. at 273-74; *Burns*, 500 U.S. at 492-96.

Petitioner nonetheless insists that he is entitled to greater protection because the actual statute he used is capable of both investigative and prosecutorial uses (*i.e.*, securing a witness for trial) and because courts may not inquire into the actual purpose of the warrant. Petr. Br. Part I. That argument cannot be squared with this Court's immunity decisions.

1. Immunity Hinges On A Particular Action's Function, Not Its Label.

Petitioner's insistence that every use of a material witness warrant must be considered prosecutorial runs counter to this Court's longstanding focus on function over labels, and on the practical realities of each case rather than on broad generalizations.

Since its decision in *Imbler*, this Court has declined to establish bright-line rules to determine whether a prosecutor's action is sufficiently integral to the judicial process to be entitled to absolute immunity, noting that "[d]rawing a proper line between these functions may present difficult questions." 424 U.S. at 431 n.33. Indeed, the various hats – administrative, investigative, and prosecutorial – that a government lawyer wears can make it difficult to determine when "the prosecutor . . . functions as an administrator rather than as an officer of the court." *Id.* The inquiry is even more difficult with respect to the Attorney General of the United States, who also supervises all FBI investigations, 28 C.F.R. § 0.85a, and sets policy for the entire Department of Justice, 28 C.F.R. § 0.5.

Given this complexity, and the court-based origins of prosecutorial immunity, the Court has refused to declare that every action by a prosecutor qualifies for absolute immunity. For example, in *Mitchell*, 472 U.S. at 521, the Court held that the Attorney General was entitled only to qualified immunity to claims that he had violated constitutional rights by authorizing warrantless wiretaps when the purpose of the wiretaps was to gather national security information regarding

allegedly radical groups. *See also Buckley*, 509 U.S. at 271-78 (no absolute prosecutorial immunity for participation in investigation); *Burns*, 500 U.S. at 492-96 (prosecutor not entitled to absolute immunity when counseling police regarding investigation). Instead, the Court examines "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127 (quoting *Forrester v. White*, 484 U.S. 219 (1988)).

The court has applied the same context-specific analysis when deciding whether any particular action qualifies as prosecutorial. For example, in *Kalina*, 522 U.S. at 129, the Court rejected the view that prosecutors are entitled to absolute immunity with respect to all court filings, holding instead that the prosecutor in that case enjoyed absolute immunity with respect to filings that were "part of the advocate's function," but not for other filings that could have been executed by an investigator. *Id.* at 130. Similarly, the courts of appeals frequently classify the same action as either prosecutorial or investigatory depending on the surrounding circumstances. For example, a search warrant may be prosecutorial if "the purpose for which [the prosecutors] sought the warrant . . . was not primarily investigative, but was to obtain and preserve the evidence." *Lomaz v. Hennosy*, 151 F.3d 493, 499 (6th Cir. 1998); *see also Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990). On the other hand, a search warrant may be investigative and thus a prosecutor will not be entitled to absolute immunity if it is used "to assist with a collateral investigation into new crimes." *KRL v. Moore*, 384

F.3d 1105, 1113 (9th Cir. 2004); *see also Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007).

Like arrest or search warrants, material witness warrants can serve different functions. In its normal application, 18 U.S.C. § 3144 secures testimony for trial, a quasi-judicial function. However, as petitioner himself has publicly acknowledged, his policy of detaining suspects as material witnesses served an investigative and preventative function: "Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting, or delaying new attacks" and "form[s] one part of the department's strategy to prevent terrorist attacks by taking suspected terrorists off the streets." *Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force* (Oct. 31, 2001), *available at* http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm.

Rather than drawing a bright line based on a "formalistic taxonomy of acts that are inherently either prosecutorial or investigative," Pet. App. 23a-24a, this Court should continue to focus on what underlying function the challenged action served, regardless of its label.

2. *Courts Need Not Turn A Blind Eye To The Objective Evidence That A Warrant's Actual Function Was Investigatory Or Preventative.*

Petitioner next argues that even if the Court is unwilling to adopt a per se rule that every use of a material witness warrant is protected by absolute immunity, courts may not determine the function of a warrant by examining the subjective motives of those

who secured it. Petr. Br. 21. And that bar on consideration of subjective motive, petitioner argues, effectively precludes any challenge to the pretextual use of a material witness warrant (leading, by different route, to the same essential conclusion that every use of a material witness warrant is protected by absolute immunity). *Id.*

Petitioner's argument conflates the impermissible investigation of a prosecutor's motive with the determination of a warrant's function based on the objective evidence surrounding its use. This Court commonly looks at objective indicators of *function* to decide whether a defendant was acting as an adjunct to a trial or instead as an investigator detached from any imminent judicial proceeding. For example, in *Buckley*, this Court considered the timing of a prosecutor's action, declining to afford absolute immunity to "an advocate before he has probable cause to have anyone arrested." 509 U.S. at 274. Similarly, in *Burns*, this Court examined whether the challenged action occurred in court, reasoning that "appearing before a judge and presenting evidence in support of a motion for a search warrant . . . clearly involve the prosecutor's" role as an advocate. 500 U.S. at 491.

The timing and location of prosecutorial conduct are by no means dispositive, but rather form two aspects of the totality of the circumstances that must be considered in deciding whether the defendant's "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Imbler*, 424 U.S. at 430. For example, in *Buckley*, the Court explained that "a

determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." 509 U.S. at 274 n.5. At the same time, "[e]ven before investigators are satisfied that probable cause exists or before an indictment is secured, a prosecutor might begin preparations to present testimony before a grand jury or at trial, to which absolute immunity must apply." *Id.* at 290 (Kennedy, J., concurring).[3]

Similarly, this Court has refused to find absolute immunity simply because the prosecutor's action took place in court. In *Kalina*, the prosecutor's in-court filings included a "certification" that summarized the evidence supporting the burglary charge and attested under the penalty of perjury to the truth of the facts set forth in the certification. 522 U.S. at 121. The Court nonetheless declined to hold that the prosecutor was absolutely immune from suit, explaining that because the prosecutor "performed an act that any competent witness might have performed," she was only entitled to qualified immunity. *Id.* at 129-30. At the same time, the mere fact that an action occurs outside of a courtroom does not automatically destroy a claim to absolute immunity. *See, e.g., Van de Kamp v. Goldstein*, 129

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[3] *See also, e.g., Kalina*, 522 U.S. at 129 (granting absolute immunity for the filing of charging documents asking the court to find probable cause); *Goldstein*, 129 S. Ct. at 862-63 (difference between supervising an individual trial, conducted after probable cause, and providing general training to line attorneys divorced from the timeline of any particular trial "does not preclude an intimate connection between prosecutorial activity and the trial").

S. Ct. 855, 862-63 (2009); *Imbler*, 424 U.S. at 431 n.33 ("We recognize that the duties of the prosecutor in his role as advocate for the State involve actions . . . apart from the courtroom.").

Accordingly, this Court has examined a variety of objective circumstances to decide whether a prosecutor's action was "prosecutorial." *See, e.g.*, *Goldstein*, 129 S. Ct. at 862 (noting that prosecutor had to use legal knowledge and was given wide discretion in performing task); *Buckley*, 509 U.S. at 272-74 (noting that prosecutor was working closely with police and prior to establishment of probable cause); *Kalina*, 522 U.S. at 130-31 (considering that prosecutor did not have to use professional legal judgment in attesting to the veracity of facts). Such an inquiry allows this Court to create the most complete picture of the action's relationship to the judicial process and thus to determine whether absolute immunity is justified by the policy balance between judicial efficiency and individual rights struck by the common law.[4]

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[4] Considering all of the relevant objective indicia does not create administrability problems for the courts. As in this case, the question of what function an official's actions served can be easily settled at the pleadings stage. Under *Twombly* and *Iqbal*, a plaintiff would need to plead enough facts to "raise a right to relief above a speculative level," *Twombly*, 550 U.S. at 555. This standard is sufficiently robust to alleviate any misplaced fear that a naked claim of pretext could open the door to extensive discovery.

3. The Objective Circumstances Surrounding Respondent's Detention Support The Court Of Appeals' Denial Of Absolute Immunity.

Petitioner has not met his burden of showing that the objective circumstances surrounding respondent's detention establish a prosecutorial use of the material witness warrant.

In this case, the totality of the facts pleaded by respondent indicates that the function of his detention was not quasi-judicial, but instead investigative. *See generally* Resp. Br. 3-6; Pet. App. 26a-27a. Although in another case the function of a material witness warrant may well be intimately bound up with a judicial proceeding, *see, e.g., Betts v. Richard*, 726 F.2d 79 (2d Cir. 1984); *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978), here respondent was seized more than a year before the trial for which he was nominally being held, First Amended Complaint (FAC) ¶ 106; was never actually called to testify in that trial, *id.*; faced lengthy interrogation regarding his personal conduct while in detention, *id.* ¶ 101; and was personally identified as a prisoner of the war on terror by the director of the FBI, *id.* ¶ 100. Petitioner's policy of using the material witness statute to detain respondent is no more entitled to absolute immunity than a prosecutor's collection of evidence against a possible suspect for whom he could not establish probable cause, *see Buckley*, 509 U.S. at 275-76, or an Attorney General's authorization of wiretaps to gather national security information, *see Mitchell*, 472 U.S. at 516, 521.

C. The Public Policy Considerations Underlying Common Law Immunities Do Not Justify Extending Absolute Immunity To Petitioner's Conduct In This Case.

Finally, affording petitioner absolute, rather than qualified, immunity would not serve the underlying purposes animating the common law's, and this Court's, recognition of absolute immunity. *See, e.g.*, *Buckley*, 509 U.S. at 269 (even if conduct was immunized at common law, Court will consider whether recognizing immunity is consistent with purposes of civil rights actions); *Malley*, 475 U.S. at 340 (same).

1. Extending Absolute Immunity To Investigative Or Preventative Material Witness Arrests Poses A Dangerous Threat To Individual Liberty.

By sheltering blatant official abuses, the additional protection accorded to governmental actors by absolute immunity carries a predictably high cost for the constitutional rights of citizens like respondent. *See supra* Part I.B. Compared with the areas in which this Court has already extended absolute judicial immunity to prosecutors – such as presenting evidence against criminal defendants apprehended after probable cause had already been established – the threat to constitutional rights significantly outweighs the government efficiency arguments that traditionally justify absolute immunity.

First, a policy of national security detentions is particularly likely to result in the abuse of individual

rights. Detaining a private citizen without probable cause, even on a reasonable suspicion of wrongdoing, violates that citizen's Fourth Amendment rights. *Dunaway v. New York*, 442 U.S. 200 (1979). The policy that petitioner is alleged to have designed and implemented allowed Justice Department officials to do just that. FAC ¶¶ 111, 113-16. The threat to individual liberty inherent in such a scheme is heightened by the veil of secrecy that naturally surrounds national security investigations. This Court has recognized that "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity." *Mitchell*, 472 U.S. at 523.

Second, this Court has consistently held that an extension of absolute immunity is inappropriate when there is a lack of "other checks that help to prevent abuses of authority from going redressed." *Id.* at 522. Here, suspects detained under material witness warrants receive fewer protections than bona fide witnesses whose testimony the prosecution secures by subpoena. Those witnesses may seek to quash or modify the subpoena if the court deems compliance to be unreasonable or oppressive. Fed. R. Crim. P. 17(c)(2). Moreover, the court may hold such a witness in contempt only if he, "without adequate excuse, disobeys a subpoena." Fed. R. Crim. P. 17(g). By contrast, a prosecutor seeking a material witness warrant need only show that "the testimony of a person is material" to a proceeding and that "it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144. Prosecutors

are not required to provide material witnesses with an opportunity to comply with a subpoena; instead, as in respondent's case, the witness can merely be seized, handcuffed, and led to detention by FBI agents. FAC ¶¶ 5, 15-16.

At the same time, the detention of material witnesses is subject to less intensive judicial oversight than are the detention and prosecution of those forthrightly accused of committing a crime. Although detainees arrested pursuant to Section 3144 are nominally subject to the same release and detention requirements as defendants pending trials, *see generally* 18 U.S.C. § 3142, in practice petitioner's policy resulted in widespread denials of the statute's safeguards, *see* HUMAN RTS. WATCH, HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, at 47-58 (2005) (describing how many suspects detained under petitioner's policy did not appear promptly before a judge, were not provided with the reasons for their arrests, and were denied counsel). Here, respondent himself did not appear before a judge until he had already been interrogated and shipped in shackles to the Alexandria Detention Center, FAC ¶¶ 65-77; he was never informed why he was arrested, *id.* ¶ 13; and he did not receive counsel at his Virginia hearing, *id.* ¶ 77.

Third, there are no other adequate institutional checks on petitioner to police constitutional violations internally. As the highest-ranking official in the Department of Justice, petitioner is different from "most of the officials who are entitled to absolute immunity from liability for damages"; those officials are "subject to other checks that help to prevent abuses of authority from going unredressed."

Mitchell, 472 U.S. at 522. As this Court has already established, "[s]imilar built-in restraints on the Attorney General's activities in the name of national security . . . do not exist." *Id.* at 523.

2. *There Is No Compelling Countervailing Need To Provide Prosecutors Absolute Immunity For Their Investigative Or Preventative Use Of Material Witness Warrants.*

This Court has identified two concerns justifying absolute immunity protections for some actions, despite the threat to individual liberties. First, any lesser degree of protection would lead to "harassment by unfounded litigation [and] cause a deflection of the prosecutor's energies from his public duties." *Imbler*, 424 U.S. at 423. Second, the fear of personal liability would lead the prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* Neither of these concerns is present when a federal official seeks a material witness warrant to interrogate a suspected terrorist about his own actions.

First, adhering to the general presumption in favor of qualified immunity will not produce a glut of frivolous lawsuits capable of distracting officials from their duties. *See Imbler*, 424 U.S. at 425 (considering frequency of possible lawsuits in assessing risk of vexatious litigation). This Court has acknowledged that investigative, national security work "does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or 'quasi-judicial' tasks

that have been the primary wellsprings of absolute immunities." *Mitchell*, 472 U.S. at 521.

This Court's observation in *Mitchell* has been borne out here, where there is only a small pool of potential suits arising out of the pretexual use of material witness warrants. For example, in 2003, the year in which respondent was arrested, less than four percent of all federal arrestees were detained pursuant to a material witness warrant; the remaining 122,286 arrestees were expressly detained based on probable cause that they themselves had committed an offense. Bureau of Justice Statistics, U.S. Dep't of Justice, Compendium of Federal Justice Statistics 2003, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf. In this case specifically, approximately seventy men are believed to have been "arrested as material witnesses in connection with [the Department of Justice's] anti-terrorism investigations," HUMAN RTS. WATCH, *supra*, at 2, and the statute of limitations has likely run on many of those individuals' claims.

If anything, these figures may overestimate the number of potential suits that will reach discovery. To survive dismissal, an aggrieved detainee must allege sufficient factual indicia that his arrest was investigatory in function, *see Twombly*, 550 U.S. at 555; that hurdle in turn requires him to overcome the information and resource discrepancies likely to exist between any individual detainee and the defendant, who has at his disposal the Government's resources and legal representation.

Second, granting qualified immunity will not chill the conduct of either prosecutors or FBI agents in prosecuting criminal cases or protecting national

security. Even if the relatively small number of possible lawsuits could create a reasonable fear of liability, qualified immunity provides sufficient protection to officials to allow them to exercise independent judgment by precluding suits based on "bare allegations of malice." *Harlow*, 457 U.S. at 817. Only when an official has violated a constitutional right that was clearly established at the time of the violation will qualified immunity "subject government officials either to the costs of the trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. Any protection that absolute immunity provides over and above qualified immunity for conscientious officials is thus marginal, and does not counterbalance the threat to individual liberties that expansion of absolute immunity creates.

Finally, to the extent the denial of absolute immunity may cause prosecutors to hesitate before misusing the material witness statute, "such reflection is desirable, because it reduces the likelihood" of the violation of fundamental constitutional rights, *Malley*, 475 U.S. at 343, and reinforces the rule of law in our democracy, even in the face of foreign threats to our security.

CONCLUSION

For the foregoing reasons, the rejection by the court of appeals of petitioner's absolute immunity defense should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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No. 10-98

In The

Supreme Court of the United States

JOHN D. ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE WESLEY MACNEIL OLIVER IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae and the author of this brief, Wesley MacNeil Oliver, is a legal historian specializing in nineteenth and early-twentieth century American criminal procedure. His research reveals that during this period of time, material witness detentions were quite common and a frequent subject of discussions in newspaper columns, city council and legislative debates, and gubernatorial messages.

The author is an Associate Professor of Law at Widener University in Harrisburg, Pennsylvania and recently completed his J.S.D. dissertation at Yale Law School entitled *The Nineteenth and Early Twentieth Century Origins of Modern Criminal Procedure: A View from the New York Police*. The panel's decision in the instant case relied on his article, *The Rise and Fall of Material Witness Detentions in Nineteenth Century New York*, 1 N.Y.U. J.L. & Liberty 727 (2005), in support for its conclusion that the practice of detaining material

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[1] Counsel for both parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae* made a monetary contribution to its preparation. The Widener University School of Law provided funding for the printing and filing costs.

witnesses dates back to at least the 1840s. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 959 (9th Cir. 2009). The arguments and historical claims in this brief are taken largely from that article and the dissertation.

The author files this brief to correct the lower court's assumptions about the history of material witness detentions. The Ninth Circuit concluded that Ashcroft's use of material witness detentions to hold those suspected of criminal activity was an "unprecedented" use of the power to detain witnesses. *Id.* at 970; *Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1131 (9th Cir. 2010) (Order Denying Rehearing En Banc).

The author's research reveals that the Ninth Circuit's historical conclusion is erroneous. Material witness detentions were frequently used as a mechanism to hold suspects of crimes in the late nineteenth and early twentieth century. Those suspected of no wrongdoing, but possessing information helpful to the government, certainly have been held as witnesses. The more common use of material witness detentions in the late nineteenth and early-twentieth century was, however, to hold those actually suspected of criminal activity. Reformers frequently criticized the detention of material witnesses during this period but were tolerant of the detention of those who were believed to be guilty of wrongdoing.

As Carolyn Ramsey, the only other legal historian to examine the history of this practice, has concluded, material witness detentions in the mid-nineteenth century became "a tool for

constructing a case against the witness himself." Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses,* 6 Ohio St. J. Crim. L. 681, 685 (2009).[2] The research of your *amicus curiae* demonstrates that holding innocent bystanders with helpful information was quite controversial in the late nineteenth and early twentieth century; holding *suspects* as witnesses was not.

As a researcher in this area of legal history, the author has an interest in correcting misconceptions about the past. Of interest to this Court, a correct understanding of the past has implications for the parties in this case. Officials, like the former Attorney General, are entitled to qualified immunity from civil rights actions so long as their official acts do not violate "clearly established" constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Ninth Circuit was required to consider whether "a reasonable officer would understand" that a constitutional right is violated when the federal material witness detention

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[2] There are surprisingly few scholarly articles written on material witness detentions. *See, e.g.*, Ricardo J. Bascaus, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 Vand. L. Rev. 677 (2005); Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 Loy. L.A. L. Rev. 1217 (2002); Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 St. John's L. Rev. 483 (2002). The author and Professor Ramsey alone have examined the history of the use of material witness detentions to hold crime suspects. *See* Ramsey, *supra*, at 685.

statute is used to hold a witness also suspected of criminal wrongdoing. *Hope v. Pelzer*, 536 U.S. 730, 747 (2002). It is surely relevant to this consideration that, at the point in American history when witness detentions occurred with relative frequency, the public had far more tolerance for the detention of suspects as witnesses than it did for the detention of individuals believed to be innocent of any wrongdoing.

ARGUMENT

History Reveals a Long and Accepted Practice of Using Material Witness Detentions to Hold Suspects

The lower court held that using the material witness detention statute to hold those suspected of criminal wrongdoing clearly violates the Fourth Amendment rights of those suspect-witnesses to be free from unreasonable searches and seizures. *Al-Kidd*, 580 F.3d at 973.

The history of material witness detentions does not support the lower court's conclusion that those who qualify as material witnesses may not be detained if the government also suspects the witness of criminal wrongdoing. During the roughly eight decade period in American history when material witness detentions were common enough to attract regular media attention, holding persons suspected of nothing but possessing helpful information was highly criticized. The detention of

those "witnesses" also suspected of crimes was accepted during this period.

During this period between 1850 and 1930, when witness detentions were common, the greatest criticism was leveled at the only use of the power to detain witnesses the lower court found constitutionally acceptable – the detention of presumptively innocent persons as witnesses. In the absence of case law condemning the detention of witnesses also suspected of criminal activity, this history demonstrates, at a minimum, that a reasonable government actor would not have known that such a detention violated the Fourth Amendment. When material witness detentions were most frequently used, those detained were often suspects.

The lower court observed that "it is unsurprising that published cases [condemning this practice] are lacking" as the use of material witness detentions to hold suspects was "unprecedented." *Al-Kidd*, 580 F.3d at 970. This historical claim is simply inaccurate. The court further opined that courts would not have previously had occasion to condemn this practice because the "obviousness of the illegality" prevented officials from using material witness detentions to hold suspects prior to September 11. *Id.* at 970.

The Ninth Circuit could have arrived at these conclusions only by ignoring eighty to ninety years of criminal procedure. Historically, material witness detentions had long been used as "a tool for constructing a case against the witness himself."

Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witness Detentions*, 6 Ohio St. J. Crim. L. 681, 685 (2009). The long-standing long-accepted practice of detaining suspects as witnesses should be considered in determining whether the former Attorney General was on notice that the practice was unconstitutional. *See Hope*, 536 U.S. at 747 (to overcome government actor's qualified immunity, plaintiff must show "a reasonable officer would understand" that the challenged action violated the constitution).

Studies on the history of material witness detentions have focused on three cities, New York, Chicago, and Los Angeles, though it is clear that the practice occurred in other American cities, including Boston and New Orleans, in the late nineteenth and early twentieth centuries. *See* Ramsey, *supra*, at 686, 696, 700 n.108; Oliver, *supra*, at 728 n.1. The history of the practice in New York City, the subject of the author's study, has lent itself to the most thorough analysis as better records of early police practices appear to have been kept in New York than in other American cities from the Antebellum to the Progressive Eras.[3]

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[3] The New York Municipal Archives claims that its "[r]ecords pertaining to the administration of criminal justice, dating from 1684 to 1966, constitute the largest and most comprehensive collection of such material in the English-speaking world." http://www.nyc.gov/html/records/html/about/archives.shtml (visited July 11, 2010).

It is clear that many of those identified, and detained, as witnesses in all of these cities were in fact suspects. *See* Ramsey, *supra*, at 686. The historical record in New York City, however, allows for a much more complete account of the history of material witness detentions in that city than is possible for other cities in this era.

Whenever New Yorkers expressed objections to the detention of material witness detentions during this period, one type of detainee was the source of their concern – the innocent detainee. Reformers from the 1840s to the 1930s expressly recognized that detaining suspects of crimes as witnesses – thus circumventing the probable cause requirement to arrest and hold a suspect – was not a concern of theirs. The very detailed picture we have of the history of material witness detentions in New York City reveals that the public acceptance of material witness detentions depended on their selective use – the very use of which respondent al-Kidd complains.

Material witness detentions were controversial from the time they first began in the 1840s, with calls for abolition of the practice being heard almost immediately. In the 1850s, reformers were appeased when the City of New York provided better housing for witnesses. By 1883, reformers accepted another compromise: a new rule that permitted *only* the detention of those witnesses suspected of criminal activity.

The compromise was consistent with the equitable arguments reformers had made since the

earliest days of material witness detentions. Even those who objected to detaining persons on the basis that they possessed helpful information seemed content when law enforcement authorities also suspected those "witnesses" of crimes. Objections to holding witnesses persisted into the twentieth century but with a caveat that the detention of those witnesses also reasonably suspected of criminal activity was acceptable.

A somewhat detailed summary of this history is presented below.

A. Origins of Material Witness Detentions

The legal origin of the power to detain witnesses is somewhat unclear. A New York statute dating back to 1829 permitted a magistrate to require witnesses to provide sureties for their appearance and permitted the magistrate to detain witnesses who were unable to do so. Oliver, *supra*, at 734; N.Y. Rev. Stat., part 4, tit. 2 §§ 21-22 (1829). Some nineteenth century critics claimed that statute merely codified a power that existed in England since 1555.[4] Whatever the original source

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[4] Oliver, *supra*, at 735; N.Y. Legislature, *Report of the Majority and Minority of the Select Committee on Governor's Message Relative to the Imprisonment of Witnesses*, N.Y. Assembly Document No. 68, at 3 (1855); Charles A. Flammer, *The Committing Magistrate* 41 (1881). Sureties operated much like modern bail, except that respectable private citizens were required to swear that they would be answerable for the amount of the bail. A witness, or suspect, to be released on such a recognizance could not obtain his release by either posting the entire amount of the required recognizance, or by contracting with a professional bail

of the authority to detain witnesses, the power does not seem to have been used with any frequency until the 1840s. Oliver, *supra*, at 737-40.

The earliest, and most highly publicized, accounts of detained witnesses involved victims of crime, held for weeks or months, until the search for the culprit was abandoned, or the culprit was convicted of some very minor offense. One of the earliest stories reported in New York involved a woman who reported to authorities that a bundle of her clothes had been stolen. She was detained for eight months; the thief was never discovered and she was eventually released. Oliver, *supra*, at 729; N. Y. Prison Association, *Annual Report* 81 (1847). Mid-nineteenth century newspapers, for obvious reasons, took particular offense at stories like these. *See, e.g., A Disgusted Hebrew,* New York Times, Jan. 23, 1878, at 3 (describing detention of man who reported the theft of his hat). There was also outrage when defendants were released on bond while the witnesses against them were held as witnesses. *See e.g.*, David R. Johnson, *The New York Police: Colonial Times to 1901*, at 76 (1970) (describing detention of rape victim while suspect went free on bond).[5]

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bondsman to be responsible for the amount in the event he failed to appear. *See* Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)*, at 507-10 (1970).

[5] For reasons that have not fully been explained, a number of rape victims were detained as witnesses against their prosecutors in the second half of the nineteenth century. Forty women in New York City were held as witnesses against their attackers from 1873 to 1882. *See* Oliver, *supra*, at 759 & n.120.

Newspapermen were far from the only people talking about the injustices visited by material witness detentions in the second half of the nineteenth century. Mayors, jailors, and even the author Charles Dickens began to express concern about how the power to detain witnesses was being exercised. Accounts focused on the burden placed on innocent bystanders, or victims of crimes, when they were held as witnesses.

In 1841, Mayor Robert H. Morris complained about the conditions in which detained witnesses were being housed. He proposed that a facility, considerably more comfortable than the Tombs, New York City's general-purpose jail, be created for the accommodation of *some* witnesses. For witnesses suspected of being accomplices to crimes, Morris proposed no improvement in their conditions. For those who were merely in the possession of helpful information, he proposed better treatment. Oliver, *supra*, at 766; Robert H. Morris, *Mayor's Message*, 8 Documents of the Board of Aldermen of New York City, Doc. 1, at 7-9 (1841).

The City Jailor two years later would similarly object to housing those "who, through no fault of their own, are placed at the mercy of our laws" in the general jail population. Oliver, *supra*, at 767; M. Fallon, *Report of the Keeper of the City Prison*, 10 Documents of the Board of Aldermen of New York City, Doc. 53, at 957 (1844).

In 1842, Charles Dickens described seeing a nine-year-old boy housed in the Tombs as a

material witness against his father, who was held in the same facility. Charles Dickens, *American Notes* 111 (1842) (Random House 1996).

Though the concerns about material witness detentions in the 1840s focused on detainees suspected of no wrongdoing, reform efforts unsuccessfully advocated eliminating the power to detain any person as a witness. Efforts to abolish the power were strenuously made in the Constitutional Convention of 1846, but were ultimately defeated. Oliver, *supra*, at 769; William G. Bishop & William H. Attree, *Report of the Debates and Proceedings of the Convention of the Constitution of the State of New York* 196, 1050, 1062 (1846).

Calls for the abolition of material witness detention would nevertheless continue into the 1850s, most prominently from the New York Prison Association. The Association, a philanthropic organization dedicated to more humane and effective prisons, criticized the practice of holding witnesses in each of its annual messages beginning with its inaugural message in 1847. Oliver, *supra*, at 731 n.15. The organization boasted some of the most influential reformers of the day as its members, including Alexis de Tocqueville, Gustav de Beaumont, Thomas Galludet, and Charles Sumner. Oliver, *supra*, at 768 n.140. The practice of detaining witnesses – and holding them with in the city jail – continued unabated until the mid-1850s despite their efforts.

B. Increased Attention in the 1850s Prompts the Creation of a House of Detention for Witnesses

Reformers through the 1850s had not adopted the dichotomy Mayor Morris had described in 1841 between "innocent" witnesses and accomplice-witnesses. Their accounts continued to focus on innocent detainees, but they had not embraced more lax rules when dealing with the witnesses who were suspected of wrongdoing themselves. This would come decades later. Their agitation did, however, spark a compromise reform – better conditions for witnesses, all witnesses, not just the "innocent" witnesses as Mayor Morris had advocated a decade earlier.

Reformers convinced the legislature that if the practice of material witness detention were to continue, detainees should be afforded better accommodations.[6] Reformers had, of course, made two objections to the detention of witnesses for over a decade: that they were detained at all and that they were held in the general jail population. This compromise overcame one of the objections.

Construction of the House of Detention for Witnesses was authorized by an 1857 act. Oliver, *supra*, at 754-55. Under the new law, all witnesses were to be housed in this facility rather than the

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[6] The lower court rejected Mr. al-Kidd's claims relating to the conditions of his confinement as a material witness. *Al-Kidd*, 580 F.3d at 977. The manner of a witness' confinement was obviously very much a concern for New Yorkers in this era of frequent material witness detention.

Tombs. *See* Metropolitan Police Act, 1857 N.Y. Laws 569.

By the 1870s, as many 668 people would spend time in the facility, on average for no longer than 10 to 20 days. In the early years of the facility, the *New York Daily Times* reported that the conditions in the house were quite good. Oliver, *supra*, at 755; *A Visit to the House of Detention*, New York Times, Oct. 4, 1859, at 8. By the 1870s, accounts of the facility were not nearly so positive. A grand jury found that the facility was not "fit for human habitation." Oliver, *supra*, at 755-56 & n.113; *Grand Jury Presentments*, New York Times, Jan. 4, 1874, at 8. At this point, reformers began anew to agitate for an end of witness detentions and with their agitation came a new compromise – a distinction between those merely in possession of helpful information and those suspected of wrongdoing who happened to possess helpful information.

C. Continued Protests to Prevent the Detention of Innocent Witnesses Leads to Dichotomy Between "Innocent" and Accomplice-Witnesses

Another round of reform efforts from the late 1860s through the early 1880s produced a second compromise that seemed to reflect all the objections reformers had implicitly made to material witness detentions. An 1883 law would prohibit the detention of witnesses who were not "reasonably believed" to be accomplices to a crime. 1883 N.Y.

Laws 416. As a result of the law, bystanders and victims could no longer be held and those suspected of wrongdoing, but not formally charged, would be held in House of Detention for Witnesses, not in the City's general jail population.

As conditions in the House of Detentions for Witnesses worsened in the 1860s and 1870s, a variety of influential New Yorkers had picked up where other reformers had left off and lobbied the legislature to abolish witness detentions. Among them were the sitting Governor, a former Attorney General for the State of New York and, most significantly, the New York Police Department. Oliver, *supra*, at 775-77. Concerns about being held as a witness had become so pervasive that eyewitnesses had become afraid to speak to officers for fear of being whisked off to the House of Detention for Witnesses. *Id.* at 776; *Metropolitan Police Report,* N.Y. Assembly Documents, Doc. 38, at 9 (1869). The police therefore asked the legislature to make a very clear statement that individuals would not be jailed for assisting police – even if this meant eliminating the power they possessed to hold suspects they lacked adequate suspicion to charge. *Id.*

With reformers still focused on the plight of innocent detainees, the compromise that would develop in 1883 is hardly surprising. In April of 1881, *Harper's Weekly* published a cartoon, reproduced below, illustrate a particular injustice that had been a rallying example for reformers since the earliest known detained witnesses. The cartoon depicted a witness to a crime held in the

House of Detention for Witnesses, while the defendant he was to testified against drank in a bar while out on bond pending trial. The honest seeming figure on the left languished in House of Detention for Witnesses while the knave depicted on the right boldly displayed a copy of his indictment with a notation at the bottom that he is out on bail.

Figure One. *An Unjust Law*, Harper's Weekly, April 9, 1881, at 1. The caption at the bottom of the cartoon reads, "The Innocent Witness Detained as a Prisoner, whilst the Criminal Goes Free."

The first legislative effort in the 1880s to address reformers concerns appears to have had little effect. In the state's new Code of Criminal Procedure, the legislature provided that a witness' financial inability to provide a bond securing his appearance at trial could not be the basis for detaining him. N.Y. Code of Crim. Pro. § 219 (1881). For reasons that are not entirely clear,

however, the numbers of persons detained as witnesses did not noticeably decrease and in 1882 the Grand Jury of New York County urged, as many others before them had done, the abolition of material witness detentions. Oliver, *supra*, at 780.

The legislature of 1883 then changed the law once again, providing that only those "reasonably believed" to be accomplices could be held as witnesses. 1883 N.Y. Laws 416; Oliver, *supra*, at 780. With this law, the legislature forbade the type of detention that had been the thrust of reformers complaints.

There was a noticeable decrease in the number of persons held following the adoption of the new statute, but a considerable number of people were still held as "witnesses." In the years 1878, 1879, and 1880, 466, 448, and 455 people were held in the house respectively. Oliver, *supra*, at 762. In 1883, 1884, and 1885, 228, 286, and 328 people were held respectively. *Id.*

The most logical inference is that many of the persons held by the late 1870s were, in fact, suspects. This would also explain why the police were willing to give up the power to hold witnesses entirely in the 1870s. If the majority of "witnesses" were, in fact, accomplices, they could have been detained using the ordinary criminal process. The House of Detention for Witnesses had, however, given the New York Police Department a mechanism to separate some accomplices and provide them better treatment, perhaps in the hope

they would cooperate with the prosecution. *See* Ramsey, *supra*, at 681.

Regardless of how the New York Police Department was actually using the power it was given prior to 1883, one thing was quite clear: reformers in New York prior to 1883 were concerned primarily about innocent detainees and the compromise legislation captured this concern. If there was concern that the NYPD would use this mechanism to circumvent the probable cause standard typically required to detain a criminal suspect, it certainly was not voiced, before or after the reform of 1883. The examples reformers used – and the statute enacted in 1883 – strongly suggest that New Yorkers had little trouble with a fairly frequently used mechanism to hold suspects as witnesses without a demonstration of probable cause of their guilt.

D. The Re-Emergence of Concern for the Innocent Detainee

By the early twentieth century, the New York Legislature restored the power of police and prosecutors to seek the detention of persons with helpful information, regardless of whether those persons were suspected of involvement in a crime. N.Y. Code of Crim. Pro. § 618-b (1904). No great notice appears to have been taken of the the restoration of the power to detain "innocent" witnesses until Prohibition prompted substantial reconsideration of the criminal justice system. When the Grand Jury of New York County again

considered the issue of material witness detention in 1930, it once again focused on the problem of those detained but suspected of no wrongdoing. It expressly found no problem with holding suspects as witnesses.

A variety of criminal justice reforms were proposed in the mid- to late-1920s and 1930s as Prohibition awakened the American conscience to problems associated with various police tactics. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure,* 105 Yale L. J. 393, 435 n.180 (1995) (observing that the high-profile Wickersham Commission examined a number of aspects of the the criminal justice system, including Prohibition enforcement).

Material witness detentions during this period have largely been overlooked by lawyers and historians as other issues were of more pressing concern during Prohibition. The Wickersham Commission, for instance, revealed a number of concerns about the administration of criminal justice during Prohibition but included little more than a passing reference to material witness detentions. *See* Ramsey, *supra*, at 684. The Commission has primarily been remembered for its discussion of interrogations and, to a lesser extent, its discussion of reckless and sometimes brutal methods of search and seizure. *See Miranda v. Arizona,* 384 U.S. 436, 445 n.5 (1966) (describing Commission's concern about interrogation practices); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State,* 48 Wm. & Mary L. Rev. 1, 161 n.538 (2006)

(describing Commission's consideration of excesses in searches and seizure during Prohibition).

Locally, in New York City, judges, politicians, and lawyers working through the Bar Association of New York City placed their focus on similar issues. *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 Rutgers L. Rev. 447, 494-509, 510-515 (2010) (describing New York City's response to search and seizure and interrogation practices during Prohibition). The practices of virtually every aspect of the criminal justice system were nevertheless placed under a microscope during the Prohibition Era and material witness detentions were no exception.

The Association of Grand Jurors of New York County published a report in early 1930 echoing the concerns expressed by reformers throughout the nineteenth century. George Z. Medalie, *A Statement of Facts and Suggested Remedies*, 8 The Panel 1 (Jan.-Feb. 1930).[7] The report accounted the injustices done to innocent persons held to secure their testimony. One particularly gripping, yet familiar tale involved a sailor who witnessed a crime and was held for months pending the trial of a culprit who posted bond as the sailor sat in jail. *Id.* at 1.

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[7] *The Panel* was published by the Association of Grand Jurors in New York County and dedicated its first publication of 1930 to a symposium on the subject of material witness detentions.

The report recognized that often detained witnesses were, in fact, uncharged suspects – and expressed no concern about their detention:

> There is first the class of persons who in some way or other are concerned more or less as accomplices in the commission of the crime charged. The law provides that they be held as material witnesses on bail or be committed in the absence of bail. There is no point in wasting sympathy about the inconvenience to which they may be subjected if they are so held or detained.

Id. at 2. *See also Discussion by Edward A. Alexander and George E. Worthington of the New York Bar,* 8 The Panel, 4, 5 (Jan.-Feb. 1930) (describing with horror with detention of pregnant women "whose only difficulty is that they have been the witness of some serious crime, thus subjecting them to detention as witnesses."); John S. Kennedy, *A Report to the State Commission of Correction,* 8 The Panel, 5, 6 (Jan.-Feb. 1930) (describing a victim being held while the person charged with the crime against him was out on bail).

The report then described a "more troublesome type of material witness detention," the detention of "underworld characters" whose allegiances prevent them from providing helpful information to investigators, if they happen to possess such information. The grand jurors concluded that if it was established that these characters were, in fact, in possession of information material to a

prosecution, their detention was appropriate. Noting that such detentions were "not within the contemplation of our law," the grand jurors observed that "[j]ust judges and public-spirited citizens, however, are hardly inclined to voice a protest at this strain of a legal principle." Medalie, *supra*, at 2.

Like their nineteenth century counterparts, these Prohibition Era reformers sought to improve the lot of those poor souls who, innocent of any crime, were incarcerated to ensure that prosecutions were not lost for lack of evidence. They demonstrated no concern that witnesses might also be suspects – and thus temporarily held on a standard less exacting than probable cause. They even recognized the common practice – and widespread acceptance – of detaining material witnesses who were neither witnesses nor suspects, but merely affiliated with the emerging world of organized crime.

Pretextual detentions of material witnesses thus not only occurred prior to the Terror of September 11, 2001, but the practice was generally accepted for at least eighty years. This fact is difficult to reconcile with the Ninth Circuit panel's conclusion in the instant case describing the practice as "unprecedented" and noting that the lack of authority condemning this use of witness detention is "due more to the obviousness of the illegality than the novelty of the legal issue." *Al-Kidd*, 580 F.3d at 970.

CONCLUSION

This Court should reverse the lower court's holding that the government's suspicion of Mr. al-Kidd's criminal wrongdoing rendered his otherwise legitimate detention as a material witness clearly unconstitutional.

Respectfully submitted,

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Date: December 13, 2010